No. 218.
[illegible] King, King [illegible] for Appellant.

Filed Nov. 28, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

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v.

THE UNITED STATES.

Brief for Appellant.

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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a judgment of the Court of Claims in favor of the United States in a suit for repayment of the tax paid upon alcohol used in the manufacture of dissolved shellac as stiffening in hats made by the claimant.

The claim is made under § 61 of the general revenue act of August 28, 1894, 2 Supp. R. S. 330, 28 Stat. L. 567, as follows:

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

The Court of Claims thus summarizes the facts in the opinion (Rec. 22):

"The findings in substance show, that the claimant was, as it is alleged, at the time and place a manufacturer of 'stiff hats' and that in such manufacture he used 2,604.17 gallons of domestic alcohol on which a tax had been paid of 90 cents amounting to the sum of $2,344.40 and 4,456.78 gallons of domestic alcohol on which a tax had been paid at the rate of $1.10 per gallon amounting to the sum of $4,900.81, making in the aggregate the sum of $7,244.20; and that on several occasions he tendered to the collector of the district evidence tending to show the use and consumption of said amount of alcohol, exhibited and offered to deliver to the collector evidence showing that the tax had been paid on the alcohol; but the collector acting under the instructions of the Secretary of the Treasury declined to receive the stamps, affidavits or other evidence. The failure and refusal of the collector to receive and recognize the evidence offered by the claimant was owing to the failure of the Secretary of the Treasury in not preparing and prescribing regulations under the sixty-first section of the act of August 28, 1894."

The Commissioner of Internal Revenue (Rec. 7, 23) on October 3, 1894, wrote the Secretary of the Treasury that it was "found to be impossible to prepare these regulations in a way that will prove satisfactory without official supervision" and inquired whether there was any appropriation to defray the expenses of supervision.

The Secretary replied (Rec. 7, 23) on October 5, 1894, that no appropriation had been made for any purpose "connected with the execution of the section of the statute referred to."

The Commissioner replied (Rec. 8, 23) on October 5, 1894, that he had been unable "to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision which has not been provided for by Congress,"

and recommended that "the preparation of these regulations be delayed until Congress has opportunity to supply this omission." The Secretary answered (Rec. 8, 24) that he had "arrived at the conclusion that, until further action is taken by Congress, it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law." The correspondence appears in full in Finding VII (Rec. 7–9).

The court continues (Rec. 24):

"In consequence of that letter the following circular was issued by the Commissioner of Internal Revenue:

'TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE.
WASHINGTON, D. C., *November 24, 1894.*

In view of the fact that this department has been unable to formulate effective regulations for carrying out the provisions of § 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the 'arts, or in any medicinal or other like compounds,' collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used, or the articles manufactured therefrom, can be made; and that no application for such rebate can be allowed or entertained.

"On December 9, 1894, the Secretary of the Treasury in his annual report to Congress stated in substance, that owing to the defects in the legislation, the department was unable to execute the provisions of the sixty-first section of the act of 1894, and that after a full consideration of the subject and an unsuccessful attempt to frame regulations which without official supervision would protect the Government and the manufacturers, the department was constrained to await the further action of Congress."

The claimant contended that, in the absence of regulations, his right to repayment of the tax was absolute

upon his use of the alcohol for the purposes named in the law, and that the failure of the Secretary of the Treasury to make effective regulations did not defeat the right granted him by Congress.

The Court of Claims decided (Rec. 35) that, to satisfy the statute, it was essential that the manufacturer should have used alcohol under regulations prescribed by the Secretary of the Treasury. Upon the ground that he had failed to prescribe any, and that the use had, therefore, not been "under regulations," it dismissed the petition.

ASSIGNMENT OF ERROR.

For error, the appellant says that the court erred in rendering judgment against him, because the claimant's right was dependent upon the statute and, in the absence of regulations, he was entitled to judgment upon proof of the facts required by the statute.

ARGUMENT.

I. THE GENERAL PURPOSES OF THE ACT OF 1894.

The act of August 28, 1894 (28 Stat. L. 509), is one of a series of general revenue laws (see act of March 3, 1883, 22 Stat. L. 488; October 1, 1890, 26 Stat. L. 567; July 24, 1897, 30 Stat. L. 151), which it is the legislative policy of this country to adopt from time to time. It contains provisions both for customs and internal taxes, and was avowedly based on a purpose declared in its title "to reduce taxation" and "to provide revenue for the Government." Its general intent has an important bearing on the construction of § 61, and can best be determined by considering the antecedent circumstances leading to its enact-

ment. This court said in *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79:

"In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety, recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (*Aldridge* v. *Williams*, 3 How. 24; *Preston* v. *Browder*, 1 Wheat. 120.)"

It is a matter of public history, and may, indeed, be inferred by comparison of the act of 1894 with previous revenue acts, that the purpose "to reduce taxation" was to be accomplished by reducing or abolishing the customs duties on raw materials and by reducing those on manufactured products; and that the purpose "to provide revenue," diminished by this course, was to be fulfilled by an increase of internal revenue taxes. Chief among these were the provisions for an income tax (§§ 27–37, 2 Supp. R. S. 316–323; 28 Stat. L. 553, 560), the imposition of a tax on playing cards (§§ 38–47, 2 Supp. R. S. 323–325; 28 Stat L. 560, 562) and the increase of the tax on distilled spirits from ninety cents to a dollar and ten cents a proof gallon (§ 48, 2 Supp. R. S. 325; 28 Stat. L. 563).

II. THE TAXATION OF DISTILLED SPIRITS.

Rates, Method and Percentage of Taxation.

The taxation of distilled spirits has been "a fruitful source of Congressional legislation and judicial controversy" since the imposition of a tax by the act of July 1, 1862 (12 Stat. L. 447), the first tax on this product since

December 23, 1817 (3 Stat. L. 401). The tax then imposed at the rate of twenty cents a proof gallon was gradually increased until from 1866 to 1868 it was two dollars. It was then decreased to fifty cents, but raised by successive steps until the present tax of one dollar and ten cents.

The following are the various acts and the rates fixed by them:

Date of Act.	Vol.	Stat. L. page.	Amount.
July 1, 1862	12 Stat.	447	$ 20
March 7, 1864	13 "	14	60
June 30, 1864	13 "	243	1 50
July 13, 1866	14 "	157	2 00
July 20, 1868	15 "	125	50
June 6, 1872	17 "	238	70
March 3, 1875	18 "	339	90
August 27, 1894	28 "	563	1 10

The present tax, it is seen, is the highest ever imposed, except between 1864 and 1868.

The tax is imposed (R. S. §3248) upon the alcohol in the product. The proof gallon, which is the unit of tax, is defined by R. S. §3249 as "alcoholic liquor which contains one-half its volume of alcohol." The actual tax upon alcohol is, therefore, at twice the rate fixed by the law, or $2.20 a gallon. If absolute alcohol could be obtained, it would be known to the internal revenue law as 200° proof. At the present rate of tax, as appears by Finding II (Rec. 4), the tax is 900 per cent of the value of commercial alcohol.

Commercial alcohol as known to trade is about 94° alcohol or, in internal revenue parlance, 188° proof.

Reason for High Taxation.

It was on account of their pernicious effects as a beverage that distilled spirits were originally taxed in Eng-

land in 1729; and such has been the theory of their taxation from that date to the present in that country, as well as from 1862 in the United States. In Dowell's History of Taxation and Taxes in England, stated in the opinion of this court in *Pollock* v. *Farmers' Loan and Trust Company*, 158 U. S. 601, 630, as "admitted to be the leading authority," it is said (2d Ed. Vol. 4, p. 167):

"In 1729, the habit of drinking spirits had increased to such a degree among the lower class of the people, that the legislature was induced to interfere and attempt to stop the increasing tide of drunkenness. They condemned the constant and excessive use of spirits evident among the lower classes, as 'tending to the destruction of the health of the people, enervating them, and rendering them unfit for useful labour and service.' By intoxication the people were debauched in morals, and driven into all manner of vices and wickedness (2 Geo. II, c. 17); and 'this licentious use of these pernicious liquors' was due to cheap gin and the unrestricted liberty of selling it. In that view, first, a heavy tax was imposed upon gin of all sorts, *i. e.* 'gin, geneva, juniper water, and all other compositions of any other ingredients with brandy, low wines or spirits, by whatsoever name called.' Secondly, all distillers of compounded waters were placed under the supervision of the Excise. Thirdly, an annual license costing 20*l.* was required for all retailers of gin or compounded waters; retailer meaning any person selling less than a gallon at a time. And lastly, the hawking of brandy, strong waters, or other spirits about the streets was totally prohibited."

A recent writer, Frederick C. Howe, in his work entitled "Taxation and Taxes in the United States under the Internal Revenue System," says (p. 136):

"The well-nigh universal experience of foreign states, the more recent history of our own excise, as well as the demands of social, economic, and fiscal considerations, unite in admitting distilled spirits to be a most proper object for taxation."

See also Eldridge on Internal Revenue Laws, pp. 43, 44; Wells' Practical Economics, pp. 194, 195, 209, 216, 229.

The tax on alcohol as an intoxicant is in theory justifiable, and in practice probably beneficent. Intoxicating liquors are by large numbers of persons regarded as an unmitigated evil; and by most others as a superfluous luxury. The enormous percentage of the tax to the value of the product taxed is justified upon this ground and upon no other.

III. ALCOHOL USED IN THE ARTS.

Character of Uses.

So generally is the use of alcohol as a beverage recognized as its chief use that it may fairly be questioned whether it would popularly be recognized that it has many other uses. Comparatively few, except those commercially interested or special students of the subject know the many additional purposes in the industrial arts for which it is used in articles entering into daily consumption. That a considerable quantity may be an important element in the manufacture of the stiff "Derby" hat of every day use is disclosed by the findings in this case, and perhaps so disclosed for the first time to some readers of this brief. Official investigation (see Sen. Rep. 411, 55th Cong. 2d Sess.) shows that it is also used in the manufacture of varnish, pharmaceutical preparations, chemicals, flavoring extracts, perfumery, chewing tobacco, photographic materials, electric insulators, enamelled ironware, fulminate of mercury and smokeless powder.

Beverage Tax not Justifiable on These Articles.

It will readily be admitted that an internal revenue tax of 900 per cent upon a common constituent of the

domestic manufacture of these articles can not be justified on any recognized principles of taxation. The reason justifying this tax on beverages fails when applied to alcohol used in the arts.

The extremely high percentage of this taxation is the more emphasized by the fact that the average of tariff taxation on articles of foreign manufacture has never been equal to fifty per cent *ad valorem*, even in the acts of 1890 and 1897, avowedly based on the principle of high protection.

Legislative Attempts at Freedom.

Under these conditions it is not surprising that for many years there has been urged upon Congress a removal of the tax on alcohol used in the arts. This was done in 1882 (Congressional Record, Vol. 13, pp. 5325, 5360–5364), when Representative Hewitt of New York, himself widely known as a manufacturer, said (p. 5363):

"According to my observation there is no one article embraced within the tariff or internal revenue system which is of such universal application in the arts as alcohol. My friend from Pennsylvania (Mr. Kelley) very properly said that it was nature's great solvent. Solvent of what? Solvent of the material which must enter into the great chemical industries of this country. And if those industries are to thrive, if they are to be able to enter into competition with similar foreign industries, this barrier must be removed."

In 1886 (Congressional Record, Vol. 17, pp. 341, 394, 582), the movement was renewed. In 1888 the Senate Committee on Finance, on the 4th of October, by its chairman, Mr. Aldrich, submitted the following as a portion of its report on the so-called Mills Bill (Senate Report No. 2332, 50th Congress, 1st Session, reprinted

in Senate Report 760, 53d Congress, 3d Session, Part 1, p. 100):

"The provisions of the substitute which allow the use of alcohol in the industrial arts free from taxation would prove of great benefit to a large number of important manufacturers. Alcohol is used in the production of more than five hundred chemical and pharmaceutical preparations and in many of the mechanical and industrial arts, and its use in all these directions would be largely extended if the onerous tax should be abolished. The heavy tax upon alcohol unnecessarily increases the price of many manufactured products, with no corresponding benefit except the resulting revenue, which is now unnecessary."

The legislation then proposed was for the use of alcohol in the arts, in bond under severe restrictions, without previous payment of tax. That bill, however, failed to become a law.

A proposition similar to that reported in the Mills bill was discussed and rejected as an amendment to the bill which became the act of August 28, 1894, (Cong. Rec. Vol. 26, Part 7, pp. 6935, 6936). The provision finally adopted (§ 61) provides a totally different mode of giving free alcohol in the arts by payment of the tax and a later rebate upon proof of the use of the alcohol.

Legislation of Foreign Countries.

The policy so long urged upon Congress and embodied in §61 of the act of 1894, had already been adopted in the legislation of Great Britain, Germany, France and other commercial nations. The laws appear in Sen. Rep. 760, parts 1 and 2, 53d Cong. 2d Sess. and in Sen. Rep. 411, 55th Cong. 2d Sess. They show that the policy, once adopted, has always been adhered to, and generally extended. In the latter document appears an official

report of an investigation made in foreign countries of their laws, regulations and practical administration in regard to free alcohol for uses in the arts.

In Great Britain (p. 45) alcohol is allowed free of tax when methylated or denaturalized by being mixed with wood alcohol, acetone, naphtha, or other substance, rendering it unfit for drinking. Under earlier laws, a rebate of tax was made; under existing laws, the alcohol so treated is free of tax from the beginning.

In Germany (p. 55) increasing latitude and freedom have been allowed by amendments, from time to time, of the laws and regulations in regard to the use of alcohol in the arts free of tax, and there is no desire to abrogate the free alcohol laws. "The consumption of alcohol in chemical, pharmaceutical and other manufactories is constantly and largely increasing." Alcohol is made free not only when methylated, for use in the industrial arts, but when pure, for scientific and medicinal purposes, for manufacturers of soap and perfumery, and for other like purposes. The method adopted is to rebate the production tax, but to release the alcohol from payment of the consumption tax.

France (p. 87) allows free alcohol for varnish, insect destroyers, simple and compound ethers, dyes, tannin, various alkaloids, fulminate of mercury, for lighting and heating, for transparent soaps, chloroform, chloral, collodion and liquid rennet. The general denaturalizing agent is methylene, a mixture of methyl alcohol, acetone and pyroligneous impurities. Special agents are allowed for ethers, such as ether itself, bromine, sulphuric acid, sodium and other chemicals; for chloral, chlorine gas; for collodion, ether; for making liquid rennet, the alcohol is diluted with brine, and for lighting and heating, where it is sold in the open market, beside the ordi-

nary methylene, heavy benzine is added and green malachite to color it green.

In Belgium free alcohol is allowed for industrial purposes, including heating and lighting (p. 139). The Minister of Finance determines the process of methylation and the nature and proportion of substances necessary to render the alcohol unsuitable for human consumption (p. 144).

In Switzerland the government has a monopoly of the alcohol trade and sells alcohol for industrial or domestic uses on special terms. The mode of methylation is determined by the authorities (p. 219) and is called either absolute or relative methylation, defined as follows:

"The absolute methylation shall interfere as little as possible with the employment of the methylated alcohol as a combustible, etc. for household purposes.

"In relative methylation the choice of the methylating substance may vary with the scientific or technical uses, or with the special industrial product for which the methylated alcohol is intended."

Freedom from tax on alcohol for industrial purposes is thought so important that the following amendment to the Constitution was adopted on October 25, 1885 (p. 224):

"The Confederation is authorized, by way of legislation, to issue directions relating to the manufacture and sale of distilled liquors. At this legislation those products that either are to be exported or that have undergone a preparation excluding their use as a beverage shall not be subjected to any taxation."

In The Netherlands (p. 225) a liberal methylation law is in force, wood spirits being used.

In Sweden alcohol is free when made unfit for drinking purposes by denaturalization (p. 244). Wood spirits and pyridine bases are the common denaturalizing agents

(p. 245), but in making varnish, turpentine is used; for percussion caps and fulminate of mercury, turpentine or hartshorn oil; for alkaloids, the same; for medicinal extracts, turpentine; for chloroform and other like chemicals, hartshorn oil, and for making tannic and salicylic acids, ethyl ether. Alcohol for vinegar is made free by the use of 3 per cent of acetic acid.

In Norway (p. 263) methyl alcohol and pyridine bases are added (p. 267). For sale in the open market, suitable coloring matter is used and for making varnish, fulminate of mercury and other articles, already mentioned in referring to Sweden, similar provisions obtain.

In Portugal (p. 272) provisions for methylation are in force.

In Austria-Hungary the law is much the same as in Germany. The ingenuity of the chemists of this country has, however, applied to practical purposes a very remarkable agent for identifying the tax-free spirits. When wood spirits are used, phenol phthalein is added. The report says (p. 284):

"The phenol phthalein has the quality that it easily dissolves in alcohol, concentrated, as also diluted, without changing the color of the latter, but that the spirits blended with the same directly take a vivid and intensely red color as soon as natron lye is admixed with them. The coloration thereby affected is such an abundant one that the same remains distinctly noticeable even in such a rare fraction of 1:10,000,000.

"Through the addition of phenol phthalein, therefore, the controlling officials are put in the position, in a simple manner, at all times to prove whether potable spirits have been manufactured from spirits which have been methylated for the common commerce, or are blended or not blended with such spirits."

Special methylates are allowed (p. 290) such as turpentine, animal oil, mineral oil and sulphuric ether, as

adapted to each branch of manufacture. Liberal provisions are made similar to those in force in Germany, allowing alcohol free of tax for medicinal and scientific purposes (p. 293).

It is worthy of note that the progress of each country has been towards greater freedom. In Germany this has reached its maximum, and affords one among many illustrations of the thorough, intelligent and scientific methods which are opening the markets of the world to German manufactures.

This brief review establishes that § 61 of the act of 1894 was the adoption by Congress of a policy of taxation, placing the country in this respect on a level in the markets of the world with the most enlightened commercial nations. It was unfortunate, as well as unlawful, that the Secretary of the Treasury, closing his eyes to the practices of other nations, declined to perform the duties imposed on him in executing the legislative policy.

Freedom of Alcohol in the Arts a Logical Element of the Act of 1894.

The policy of free alcohol in the arts was, indeed, the logical outcome of the principles of the act of 1894. The other provisions, giving free raw materials, reducing the rates of customs duties on manufactured articles and raising the rate of internal revenue tax on alcohol, made this policy not only a logical result but an industrial necessity.

As a raw material of the many industries already detailed, it was entitled to be placed in a position fully as advantageous as imported raw materials. But, of still greater practical importance, the increase of the internal tax on alcohol used in the arts, coupled with the reduction of the tariff tax on imported manufactured articles, would have placed domestic manufactured

articles, using alcohol, in an unfavorable relative position to the foreign articles. Especially would this be true when these were made in a country allowing free alcohol in the arts.

The present case is an instance. By the tariff act of 1890, paragraph 451, a specific duty is imposed on hats of fur equivalent to 55 per cent *ad valorem*. The tariff act of 1894 imposes, by paragraph 335, a duty upon hats of fur of forty per cent *ad valorem*. See Sen. Rep. 698, 53d Cong. 2d Sess. p. 257.

Hence, had Congress increased the tax on domestic alcohol, while reducing the tariff on foreign articles using alcohol, without bringing our own legislation into line with those of other countries allowing free alcohol in the arts, the results would have been of the most detrimental character to American manufacturers of these articles.

While political thinkers are not in accord on the policy of directly encouraging domestic manufactures by discriminating against foreign goods in the imposition of tariff duties, no one contends for discriminations against our own manufacturers in our own markets. Such discrimination would have been the necessary result of the legislation referred to had it not been accompanied by the provisions of § 61 exempting alcohol used by American manufacturers from tax. No American Congress could have contemplated so iniquitous a result of legislation. § 61 of the act conclusively shows that such a result was carefully guarded against in considering the effect of the act as a whole upon American manufactures.

But this is not all. By § 22 of the tariff act of 1894—an extension of § 3019 of the Revised Statutes—it is provided:

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall

be allowed on the exportation of such article, a drawback equal in amount to the duties paid on such materials used, less one per centum of such duties."

Under this provision an American manufacturer of goods for export, into which alcohol enters, can use foreign alcohol, and, upon exporting the finished product, secure a drawback of all duties paid on such alcohol, thereby getting his foreign alcohol free of tax. Unless this provision allowing a drawback of the tariff duty on foreign alcohol used in the arts and manufactures is accompanied by a corresponding provision for rebate on domestic alcohol so used, it necessarily follows that an American manufacturer producing such goods for export is driven almost by necessity to import his alcohol for the manufacture of all goods so exported. Congress would not intentionally make such discrimination against the American farmer, the producer of the grain from which alcohol is made, who, of all classes of producers, receives the least direct protection from our tariff laws. Yet this is the necessary result of legislation allowing a drawback on foreign alcohol and none on domestic. At the present time, since the repeal of § 61, a large quantity of foreign alcohol is thus used in the manufacture of goods for export. Drawbacks are allowed by the Treasury on such alcohol. (Synopsis Treasury Decisions, 1894, No. 14,977.)

It was such considerations as these that impelled Congress to make free from taxation by § 61 all domestic alcohol used by manufacturers "in the arts, or in any medicinal or other like compound." That freedom constituted an essential feature of the revenue system established by the act of 1894, and its maintenance was essential to the logical preservation of the system of which it formed a part. The form of the enforcement of this policy, whether by payment and rebate of the tax or by

initial freedom, is immaterial; in either case, the intended policy is executed, freedom of the alcohol from tax is attained.

This Section a New Policy of Taxation.

The investigation of the principle upon which this tax is based, the legislation of foreign countries and the accompanying provisions of the act of 1894, show that § 61 is a general declaration of a new revenue policy, recognizing the principle on which the taxation of distilled spirits is based and consonant with the most enlightened legislation of the commercial world.

Free Alcohol in the Arts Illustrated.

The extent and importance of the question of the use of alcohol in the arts and the effect upon the industries using alcohol for purposes other than as a beverage, are probably better set forth in a letter from David A. Wells, formerly Special Commissioner of the Revenue, to the Chief of the Bureau of Statistics, on October 11, 1887, than elsewhere. This will be found in Sen. Rep. 760, 53d Cong. 3d Sess. part I, pp. 102–104. It is inserted even at the risk of undue extension of this argument, as an appendix at the close of this brief.

IV. THE RIGHT FIXED BY STATUTE AND NOT BY REGULATION.

The language of § 61 is as follows:

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and

exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

The Purposes of the Law.

Reading together the sections of this act relating to distilled spirits, it may be said that Congress had in view two purposes: the first, by § 48, to increase the tax on distilled spirits; the second, by § 61, to make free of tax alcohol used in the arts. They formed part of one system and are to be so construed. These purposes have been recognized by the Court of Claims in its opinion (Rec. 26).

The Secretary's Duty.

To carry out the second of these purposes the Secretary of the Treasury was directed to make regulations. The terms of the act deny any discretion to him as to whether he shall make regulations. The words "regulations to be prescribed" mean "regulations which are to be prescribed," *i. e.* which shall be prescribed.

If, instead of the infinitive form the clause as to regulations had been put into an independent sentence, the mere introduction of the verb required for the completion of the sentence would make the clause read "regulations are to be prescribed by the Secretary of the Treasury." This would, grammatically and logically, be the equivalent of "regulations must be prescribed," or, "regulations shall be prescribed by the Secretary of the Treasury."

His discretion as to the character of the regulations is very broad, but his duty to prescribe regulations of some character is unconditional.

While the Court of Claims does not admit this conten-

tion (Rec. 35), it is equally not denied. The language plainly indicates the legislative will that regulations are to be prescribed. But this will was defeated because the Secretary of the Treasury, for reasons which we shall consider hereafter, declined to prescribe effective regulations.

Claimant's Rights Not Affected by Official Failure.

The claimant contends that the purpose of Congress to relieve him of taxation can not be defeated by the refusal of the Secretary of the Treasury to carry out the law.

The Court of Claims, relying on nothing but a supposed verbal peculiarity in the phraseology of the statute, holds that, without regard to the duty of the Secretary, his failure to prescribe "effective regulations" defeats the claimant's right.

It will be our effort to show that, as the power to tax or not to tax is one peculiarly within the control of the legislative branch of the Government, the principle must be applied, which has uniformly been held by the courts, that, when Congress grants relief from taxation the courts are open to the citizen for redress for executive refusal to execute the legislative will.

The Question Settled by Adjudged Cases.

On this point the case of *Campbell* v. *United States*, 107 U. S. 407, is in principle identical with the present. The opinion of this court by Mr. Justice Miller is so directly in point that we here quote it in full:

"The fourth section of the act of August 5, 1861, c. 45, reads as follows: 'That from and after the passage of this act there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback equal in amount to the

duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury; *Provided*, that ten per centum on the amount of all drawbacks so allowed shall be retained for the use of the United States by the collectors paying such drawbacks respectively.'

"On the 22nd of January, 1862, the Secretary established such regulations as he deemed appropriate, the first of which is this:

"'To entitle the exporter to such allowance of drawback, he must, at least six hours previous to the putting or lading any of the articles intended to be exported by him for benefit of drawback on board any vessel or other conveyance for exportation, lodge with the collector of customs for the district from which such exportation is to be made, an entry setting forth his intention to export such articles, and the marks, numbers, and a particular description of the same, with their quantity and value, and designating the manufacturer thereof, the place where deposited, the name of the vessel or other conveyance in or by which, and the port or place to which the same are intended to be exported, and also describing in such entry the material or materials severally from which he claims the articles to have been manufactured, designating when, where, whence, by whom, and in what vessel or other conveyance the same was or were imported, and specifying the quantity and value thereof used in the manufacture. This entry shall, upon presentation, be verified by the oath or affirmation of the proprietor and the foreman of the manufactory in which such articles were made.'

"Other regulations require the collector and the surveyor to make the necessary examination to ascertain if the articles described in this entry be as stated, and to mark and designate them accordingly, and to verify the weight, gauge, measure, or amount, and to superintend the lading for export, &c.

"All this having been done, and the oath of the exporter and his bond, with condition prescribed by the rules, being given, the collector is to give a certificate of the amount to which the party is entitled as drawback, on which he is to receive the money.

"George W. Campbell and George A. Thayer, survivors of Ludlow D. Campbell, deceased, sued in the Court of Claims for a drawback on account of large amounts of linseed cake made by them out of linseed imported from a foreign country, and which cake they exported to London.

"Their petition was dismissed by that court, on the ground, as stated in their opinion, that it was not a case of which they had jurisdiction.

"The court, however, did entertain jurisdiction of the case; an answer was filed on behalf of the United States denying the allegations of the petition, testimony was taken, and a full and elaborate finding of facts was made, and on this, the court, as a conclusion of law, find that for want of jurisdiction of the subject matter the petition is dismissed.

"This finding of facts shows that in the months of September, October, November, and December, 1870, claimants imported from Calcutta large quantities of linseed, for which they paid the duty of sixteen cents per hundred pounds according to law, which was by them, without intermixture with any other linseed or other material, manufactured into linseed oil and linseed cake, of the latter of which article there was produced therefrom 5,156,585 pounds.

"It was for the exportation of part of this latter product that the drawback is claimed in this suit. As, however, this was done by several shipments at different times, and as the finding of facts is precisely the same in the case of each shipment, except as to date, quantity, and the name of the vessel, we give here verbatim the finding as to the first:

"'On the nineteenth day of January, 1871, the claimants and said Ludlow D. Campbell were the owners of and had in their possession 447,712 pounds of linseed cake, being parcel of the aforesaid 5,156,585 pounds, and desiring and intending to export the same from New York to London for the benefit of the drawback authorized by the fourth section of the "Act to provide increased revenue from imports to pay interest on the public debt, and for other purposes," approved August 5, 1861, duly

presented to and lodged with the Collector of Customs for the port of New York, before putting or lading any of the said cake on board any vessel for exportation, an entry of said linseed cake for export by the ship "Sterling Castle," which was accompanied with the certificate and oath required by, and was in all respects in conformity with, the regulations prescribed by the Secretary of the Treasury, in pursuance of the requirement of the fourth section of said act, and the said claimants and the said Ludlow D. Campbell in all respects conformed to such regulations in respect to drawback, which allowance had been by said regulations fixed at seventeen cents per one hundred pounds, and made payable by the United States thirty days after clearance of the vessel by which exportation was made, but the said collector, acting under instructions from the Secretary of the Treasury, given on the fifth day of December, 1870, wholly refused to perform or cause to be performed in any manner any other act than the receipt of said entry prescribed by said regulations to be done, or caused to be done, by a collector of customs under the said fourth section of said act.

" 'Thereafter, in the month of January, 1871, the said 447,712 pounds of linseed cake were shipped by the claimants and said Ludlow D. Campbell, on the said ship "Sterling Castle," which vessel, with said linseed cake on board, cleared at the custom-house at the port of New York for London on the 30th day of January, 1871, and said cake was thereupon exported and carried by said vessel from New York to the port of London, in England, and there discharged and delivered, and no part thereof has been at any time relanded in any port or place within the limits of the United States.'

"The argument of counsel for the United States is, that until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes upon the United States no obligation to pay anything for such drawback; that the law conferred upon the Secretary the right to make the regulations, and the collector the power to make the certificate for payment of drawback, and that the refusal of the collector to perform

the duties imposed upon him preliminary to making his certificate, and then refusing the certificate, totally defeats the claim of the party, who, by the law, is guaranteed a right to his drawback, and who has complied with all that the law requires of him to secure and enforce it. To the same effect is the opinion of the Court of Claims.

"It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable.

"But the regulations in this case are not unreasonable, nor do they interpose any obstacle to the full assertion and adjustment of plaintiffs' right. It is the order of the Secretary of the Treasury forbidding the collector to proceed under these regulations or in any other mode, which is the real obstacle. Is that order a defense to this action? Can the Secretary, by this order, do what he could not do by regulations,—repeal or annul the law? Can he thus defeat the law he was appointed to execute, by making regulations, and then, by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?

"We think the Court of Claims has jurisdiction of such a claim: 1. Because it is founded on a law of Congress; and, 2. Because the facts found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the government.

"The finding of the court is that, by the regulations, this allowance of drawback had been fixed at seventeen cents per hundred pounds.

"The act of Congress having declared that on exportation there shall be allowed a drawback equal in amount to the duty paid on such material, and the Secretary having established by a regulation that, as regarded the cake resulting from the manufacture of the

linseed into oil and cake, the latter represents at seventeen cents per hundred pounds the duty on the imported seed so converted into cake, there resulted a contract that when exported the government would refund, repay, pay back, this amount as a drawback to the importer. If this be not so, it is because it is impossible to make a contract when the details of its *execution* or *performance* are left to officers who refuse to carry them out.

"So it is equally clear that this claim is founded on the law allowing drawback.

"The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury. This view can not be sustained. It is the *law* which gives the right, and the fact that the customs officers refuse to obey these regulations can not defeat a right which the act of Congress gives.

"The second section of the act of Sept. 20, 1850, c. 84, entitled 'An Act to enable the State of Arkansas and other States to reclaim the "Swamp lands" within their limits' declares: 'That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the governor of the State, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee-simple to said lands shall vest in the said State.'

"This duty was almost wholly neglected by the Secretary.

"In the case of *Railroad Company* v. *Smith*, 9 Wall. 95, 99, it was insisted that the failure of the Secretary to act made these lands subject to a grant for railroad purposes of a date subsequent to the swamp-land act. This proposition was thus answered by this court: 'Must the State lose the land, though clearly swamp land, because that officer had neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be de-

feated by that delay * * * Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the State, they therefore pass under a grant from which they are excepted beyond doubt, and this when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant,' that is, were granted to the State as swamp lands.

"And in *French* v. *Fyan*, 93 U. S. 169, 173, the court, reaffirming *Railroad Company* v. *Smith*, said: 'There was no means, as this court has decided, to compel him (the Secretary) to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty.'

"The application of this reasoning to the present case is too clear to need illustration.

"It is an error to suppose that the officers of customs, including the Secretary, are in regard to this law created a special tribunal to ascertain and decide conclusively upon the right to drawback. Their function is entirely ministerial. They are authorized to pass upon no question essential to the claimant's right so as to conclude him in a court of competent jurisdiction. From the moment he presents his sworn entry, they simply ascertain quantities, identify and mark packages, accept bonds and sureties, and see that the exported article leaves the port in the ship. These and like duties being discharged, it is the collector's duty—a mere ministerial function—to give the certificate of drawback. The amount of it is fixed at seventeen cents per hundred pounds by the regulation; he has nothing to do but to calculate the amount at that rate on the number of pounds shipped. He exercises no judicial or *quasi* judicial function. He concludes nobody's rights, and has no power to do so. The rights which the law gives can not

be defeated by his refusal to act, nor by his decision that no drawback was due.

"Neither the act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector, or the Secretary, or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them.

"A suggestion is made that the right to enforce the drawback in the court is affected by the fact that it is a gratuity.

"It has never been supposed that there was a gratuity in all the cases where imports are free of duty. The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country,—articles which are not sold or consumed in the United States. The linseed in this case was bought abroard and imported for the purpose of being manufactured, and the product immediately sent out of the country. The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free, and we see no gratuity in the case.

"But if it were a free gift, it is not for the officers of the government to defeat the will of Congress on this subject by refusing to execute the law.

"We are of opinion that the facts found by the Court of Claims established the right of appellants to recover a judgment for the exported cake at the rate of seventeen cents per hundred pounds; *and the cause is remanded with directions to enter such a judgment.*"

We have inserted the entire opinion of the Supreme Court on account of the instructive remarks showing that the Secretary of the Treasury is totally without power to defeat an act of Congress conferring rights upon private parties, either by refusal to make regulations, or by making regulations and then refusing to act upon them. The court treats an attempt to annul the law by regulations as

a plainer case than that then before the court, of making regulations and then ordering his officers not to act under them. For it is said (p. 410), "Can the Secretary by this order do what he could not do by regulations—repeal or annul the law?"

The letter of the Secretary of the Treasury, set out in the petition and findings of fact, may properly be regarded as a regulation undertaking to repeal or annul the law. This is the very thing which the Supreme Court treated, almost axiomatically, as a legal impossibility.

Directly in point also is the case of *Morrill* v. *Jones*, 106 U. S. 466, decided at the same term with the *Campbell* case. This case arose under the following circumstances:

"Section 2505 of the Revised Statutes provides, among other things, that 'Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free (of duty), upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe.' Article 383 of the Treasury Customs Regulations provides that before a collector admits such animals free he must, among other things, 'be satisfied that the animals are of superior stock, adapted to improving the breed in the United States.'"

The court, however, held that the restriction made by the Treasury Regulations to animals of superior stock was void, and thus commented upon the executive attempt to restrict the scope of the law (p. 467):

"The Secretary of the Treasury can not by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the

body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

If a mere restriction of the scope of an act of Congress was thus held to be beyond the power of the Secretary of the Treasury, it is much more plainly beyond his power to defeat the object of the law by absolutely refusing to make any regulations whatever.

In the recent case of *United States* v. *American Tobacco Company*, 166 U. S. 468, 475, 476, this court thus expressed, in the opinion by Mr. Justice Peckham, its views as to the office of Departmental regulations under § 3426, Rev. Stat. as amended by § 17 of the act of March 1, 1879, 1 Supp. R. S. 241, 20 Stat. L. 349:

"While the regulation prescribed by the Commissioner of Internal Revenue would be regarded as proper and appropriate for the purpose of satisfying him of the fact of the destruction of the stamps, yet we think there was a substantial compliance with that regulation on the part of the tobacco company in this case," etc.

"If the object of the regulation were to discover whether the stamps had been insured and whether payment therefor had been made by the insurance company, and if so, to base a refusal to reimburse upon that fact, we think that portion of the regulation was unreasonable, and compliance with the form as provided was unnecessary."

The principle thus established, that if a regulation is unreasonable, the right is complete under the law, without complying with the regulations, is the same as that

here contended for. In either case the right is granted by the law and is not affected by either the erroneous action or the non-action of the officer charged with its enforcement.

In *Balfour* v. *Sullivan*, 19 Fed. Rep. 578, Judge Sawyer made the following ruling (p. 579):

"Section 9 of the act of Congress of February 8, 1875, 'To amend existing customs and internal revenue laws, and for other purposes,' (Supp. Rev. St. 130), provides that '*grain bags*, the manufacture of the United States, when *exported, filled with American products, may be returned* to the United States *free of duty*, under such rules and regulations as shall be prescribed by the Secretary of the Treasury.' There is no exception to these provisions. The *bags*, whatever may be said of the *material*, were 'the manufacture of the United States,' and they were exported *filled with American products*, and being such were entitled under this act to 'be returned to the United States *free of duty*.' It does not appear to me that this explicit language is open to construction. The only exception is that they shall be returned 'under such rules and regulations as shall be prescribed by the Secretary of the Treasury.' The authority of the Secretary only extends to the *modus operandi*—the course to be pursued in identifying and returning the 'grain bags;' and that power does not extend to an imposition of a duty in the face of the provision of the statute that they 'may be returned * * * free of duty.' The statute in no sense authorizes the imposition of a duty, as a part of the rules and regulations to be prescribed by him. The omission to provide for a repayment of the drawback in such cases may be an oversight on the part of Congress. But whether so or not, to require by regulation the collection of the regular duties upon bags manufactured in the United States, because the bags, when exported, paid a 'drawback' for duties on the material of which they were manufactured, is to ingraft an exception on the provisions of the act, authorizing the bags which were 'exported filled with American products,' 'to be returned * * * free of duty,' which

Congress either did not see fit or omitted to adopt. The Secretary of the Treasury was not authorized to make any such exception. *Morrill* v. *Jones*, 106 U. S. 466; *Merritt* v. *Welsh*, 104 U. S. 702; *Balfour* v. *Sullivan*, 8 Sawy. 648; S. C. 17 Fed. Rep. 231."

In *Pascal* v. *Sullivan*, 21 Fed. Rep. 496, it was held that the Secretary of the Treasury could not make a regulation changing, in the guise of definition, the rates of duty fixed by Congress upon articles which may be lawfully imported into the United States. The court said (pp. 497, 498):

"The only question is whether, under this provision of the statute, the Secretary was authorized to make the regulation, and, being made, whether the determination that the waters are artificial mineral waters, in consequence of the absence of the prescribed certificate, is now conclusive on the rights of the importer. That the Secretary can not impose restrictions not authorized by law, was held in *Morrill* v. *Jones*, 106 U. S. 466. So, also, in *Balfour* v. *Sullivan*, 8 Sawy. 648; S. C. 17 Fed. Rep. 231. In *Campbell* v. *U. S.* 107 U. S. 410, the Supreme Court very clearly intimate that the regulations made by the Secretary, under the assumed authority granted to him, must be *reasonable*, and, if they are unreasonable, that they will be void, and should not be enforced by the courts. Says the court:

"'It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported articles on which he had paid duty, had empowered the Secretary, by regulations which might be proper to secure the Government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid, as being altogether unreasonable.'

"A regulation may, perhaps, be reasonable and proper, so far as the practical administration of the office of the

collector is concerned, provided the determination made by the collector, in pursuance of such regulation, be not conclusive on the ultimate rights of the importer. In this case, for example, to guard against fraud, and to facilitate the due administration of the customs laws, it may, perhaps, be proper for the Secretary of the Treasury to require the prescribed certificate of the owner or manager of the spring producing the water as the only *prima facie* evidence upon which the collector shall act, thereby putting the importer who declines or fails to furnish the certificate to the inconvenience of correcting in the courts, where the means of ascertaining the truth are more efficient than any in the collector's office, any error resulting from his refusal or neglect to conform to the regulations for the government and convenient administration of the affairs of the collector's office. But whether the Secretary can prescribe rules as to the character and competency of evidence that shall be binding upon the courts, or that shall conclude the rights of the importer, and, in effect, ultimately and conclusively change the rate of duties fixed by Congress upon articles which may be lawfully imported into the United States, is another question. While I am not prepared to say that the regulation in question is not a reasonable one for a proper, convenient, and speedy administration of the collector's office, I do not think it was intended, or, if it had been so intended, that it was in the power of the Secretary, by means of it, to make the action of the collector under it ultimately conclusive upon the rights of the importer, or to thereby, in effect, change the rate of duties prescribed by the act of Congress.

"If such is intended to be the effect, the rule, it seems to me, would be wholly unreasonable and void on that ground. It would empower the collector, in the guise of a rule of evidence, to change the rate of duties established by the acts of Congress. It would empower him to enact, as well as administer, laws."

A question identical in principle with that presented by the present case was decided by the Circuit Court for the Southern District of New York, in the case of *Bar-*

tram v. *United States*, 77 Fed. Rep. 604, under one of the paragraphs of the act of 1894 requiring regulations. Paragraph 387 of this act (2 Supp. R. S. 297; 28 Stat. L. 537), provides for the admission free of duty of "articles the growth, produce, and manufacture of the United States, when returned after having been exported," etc., "but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury." It was held that a failure to make regulations under this paragraph left nothing to be complied with and made the right of free admission absolute, on proof of the facts required by the statute. Referring to the regulations required by the paragraph, the court said (p. 605):

"None had been made under this paragraph at the time of these importations, and therefore none applicable were then in force. The failure to make them would not cut off nor suspend the right, but would leave none to be complied with."

The correctness of this decision is emphasized by that made in the case of *United States* v. *Dominici*, 78 Fed. Rep. 334, where, under the corresponding paragraph, 301, of the tariff act of 1890, it was held that if the Secretary of the Treasury prescribed regulations, and those regulations were reasonable, and fairly intended to carry out the provisions of the statute, they must be complied with. The court said (p. 337):

"The reasonableness and propriety of these regulations is not questioned; indeed, it is difficult to see on what ground it could be claimed that they were unreasonable, or contradictory of the provisions of the statute."

And again (p. 338):

"There has been no attempt to defeat the provisions of the statute by an arbitrary refusal to prescribe any

regulations at all, nor by the prescribing regulations which it is impossible to comply with. The rights secured to the importer by the statute are in no wise modified or interfered with or injuriously affected by the regulations, which are nowhere suggested to be contradictory of the statute, or unjust, unfair, or even unreasonable."

A prior decision of this same case of *Dominici* v. *United States* had been made by the Circuit Court, 72 Fed. Rep. 46, in favor of the importers, on the ground (p. 47) that:

"In this cause there is a finding of the local appraiser and also of the board of general appraisers that in fact these articles are shooks of American manufacture, and the board base their decision sustaining the action of the collector solely upon the ground that the importers have not complied with the regulation of the Secretary of the Treasury. Under the decision alluded to which holds first, that there was no such regulation, and secondly, that if there were it was not necessary to comply with it in the present circumstances, I am of the opinion that the decision of the board must be reversed."

The "decision alluded to" in this opinion is one which had been made in the case of *United States* v. *Mercadante*, 72 Fed. Rep. 46, where the entire opinion by Judge Wheeler was as follows:

"'Shooks, when returned as barrels,' are free of duty; but proof of identity is to be 'made under general regulations to be prescribed by the Secretary of the Treasury.' These are shooks so returned; but that proof of identity has not been made, for no such regulations appear to have been so prescribed. Such proof appears to have been provided for as a further safeguard of identity, but not as exclusive. The fact of identity has been made to appear, and it is not disputed. Nothing more could be made to appear by any proof, however prescribed. The failure to prescribe leaves the fact without further requirement to have its effect. Judgment reversed."

While it is true that this judgment seems to have been reversed by the Court of Appeals, yet that reversal was thus explained by the Circuit Court in the *Dominici* case, 72 Fed. Rep. 47:

"As I understand it, the Circuit Court of Appeals either reversed the decision of the Circuit Court or dismissed the appeal on the ground that upon the record before them there was no evidence to sustain the finding that 'the fact of identity has been made to appear and is not disputed.' If this be true, it seems to me that the decision of the Circuit Court upon the question in controversy should be followed here. The court decides two propositions, first, that there is no regulation of the Secretary of the Treasury applicable to shooks; and secondly, that it sufficiently appeared from the report of the appraiser, and from the return of the Board of General Appraisers also, that the shooks were of American manufacture, and therefore entitled to free entry and that the proof required by the regulation, even if the regulation were applicable to shooks, was only an additional safeguard and not conclusive."

The general principle to be deduced from all the cases is that regulations under revenue statutes, where reasonable and justified by the statute, are to be followed by the courts; but where the officer either prescribes no regulations, or unreasonable regulations, the courts will enforce the rights granted by Congress according to the purpose declared by the statute.

The following remarks of the United States Circuit Court for the District of Idaho (*Anchor* v. *Howe*, 50 Fed. Rep. 367, 368) have peculiar force in this connection:

"Under this section the validity of all departmental regulations which are appropriate, and within the limitations of the law, can not be doubted. This, however, is not a grant of power to legislate; to add to the law; to render its enforcement difficult; to burden the proceedings under it with unnecessary expense or hardship;

or to incumber them with onerous and technical conditions. It is designed that the permitted regulations shall simplify and explain, not embarrass, the administration of the law; and certainly they must not only be appropriate, but they must be reasonable, and within the limitations and intent of the statute. * * *

"I am unwilling to say that this and all the departmental regulations, regardless of their encroachment upon or variation from the law, and the needless expense, inconvenience, and hardship which they may entail beyond those which would result by following only the provisions of the law itself, shall be literally and technically construed and enforced. Such a rule would not be conducive to the ends of justice. When they must be followed, and when they may be disregarded, may not be easy to define by any general rule; but in all cases they must be appropriate, and within the limitations of the statute in the enforcement of which they are designed to aid, and which they can not supplant. It has frequently been held by the Supreme and other United States courts that regulations in conflict with the law are invalid; those which enlarge its requirements, though not in exact conflict with or contradiction of it, should be likewise regarded. If this rule is not clearly within the former, it is within the latter class."

Chief Justice Marshall (*United States* v. *Mann*, 2 Brock. 1) held, in a case decided by him in the Circuit Court, that rules of the Treasury Department going to an absolute denial of justice should be disregarded by the courts.

In the same line of argument, the United States District Court for the Southern District of Alabama (*United States* v. *Bedgood*, 49 Fed. Rep. 54, 58) said:

"But, in my opinion, no rule or regulation can become or have the force of law. Congress can not, if it would, confer law-making power on the Commissioner or Secretary."

It is seen upon analysis that these cases group themselves into three classes (1) where regulations were

made and not executed, (2) where unreasonable regulations were made, and (3) where no regulations were made. In all these cases alike the same rule was declared, that the right of the citizen rested on the law and not on the regulations, and that the non-action or wrong action of the executive officer could not deprive the citizen of his rights so granted. Most of these cases recognized the correlative principle that, if reasonable regulations had been made and executed, no right could have been asserted without complying with them.

The position of the claimant in this case was forcibly put by Judge Sawyer in the Circuit Court for the Northern District of California in *Siegfried* v. *Phelps*, 40 Fed. Rep. 660, as follows:

"I do not think the Secretary of the Treasury is authorized by the statute to put any burdens upon commerce, in addition to those imposed by the statute itself. He is authorized to make regulations, 'not inconsistent with law'—to regulate the imposition, and enforcement of the burdens provided for by law, but not to impose others. Burdens imposed upon commerce in addition to those imposed by statute would be 'inconsistent with law,' and unauthorized. See *Balfour* v. *Sullivan*, 8 Sawy. 649, 17 Fed. Rep. 231, and cases cited; *Merritt* v. *Welsh*, 104 U. S. 695–700; *Morrill* v. *Jones*, 106 U. S. 466."

And this court has said (*Merritt* v. *Welsh*, 104 U. S. 694, 702):

"Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.'"

The Principle Illustrated by the Converse.

It illustrates this principle to suppose that the Secretary of the Treasury had made regulations, as contem-

plated by the act, and that the claimant herein, in compliance with those regulations, had asserted a claim for a rebate of the tax, and that the same had been paid him. This would undoubtedly be a lawful exercise of power on the part of the Secretary; and the money could under those circumstances unquestionably be lawfully received and retained by the claimant. To assert, however, that the mere failure of the Secretary to make regulations has prevented the assertion of a claim, which would otherwise be valid and proper, would be to say that the regulations of the Secretary could absolutely create a right to take money from the Treasury. The arbitrary will of the Secretary, if such a position were sound, could create a liability on the part of the Government to pay out public money for which there would, in the absence of regulations, be no liability whatever. "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, 370.

The Right Judicially Enforceable.

There is a distinction between statutes which impose upon public officers duties to be performed for the benefit of some particular person or class, and those which concern only the general public, where the benefits of their enforcement are only incidentally enjoyed by particular individuals. This distinction is stated by the Supreme Court of New York in *Strong* v. *Campbell*, 11 Barb. 135, 138, by Judge Johnson:

"Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that

he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action."

An example of the former class may be found in the numerous suits brought in the Court of Claims for salaries, fees, or emoluments of public officers. For instance in the cases of letter carriers, this court said that the statute giving them extra pay for overtime "was manifestly one for the benefit of the carriers." (*United States* v. *Post*, 148 U. S. 124, 133.)

An example of the latter is the case of a bidder for a public contract, who acquires no rights before acceptance, even though his bid be the lowest (*Colorado Paving Company* v. *Murphy*, 78 Fed. Rep. 28); or the old eight-hour law of 1868, R S. § 3738, which, as it conferred no right to extra pay upon those covered by its provisions, was held to be merely directory from the Government to its officers, constituting "a matter between the principal and his agent, in which a third party has no interest." (*United States* v. *Martin*, 94 U. S. 400, 404.)

The statute now before the court is a strong instance of the former class, providing, as it does, a payment from the Treasury to a person defined, upon the performance of an act. As the claimant has shown that he has used alcohol in the arts and is within the grant of the statute, this case falls within that class of cases as to which the Court of Claims recently said (*Foster* v. *United States*, 32 C. Cls. 170, 186):

"Where Congress pledge the faith of the United States in consideration of a person doing some act, such as that in the drawback cases, or in the sugar-bounty cases,

presenting thereby an obligation in the nature of an implied contract, the action of the Secretary of the Treasury, or of the revenue officers, is not conclusive, and an action will lie upon the statutory obligation of the Government. (*Campbell's Case*, 107 U. S. 407; *Glynn's Case*, *ante*, p. 82; *United States* v. *Realty Co.* 163 U. S. 427; *Swift's Case*, 105 *Id.* 691; *Swift's Case*, 111 *Id.* 22."

The Right Confirmed by Analogous Provisions of the Act.

Section 61 is not anomalous in requiring administrative regulations for its due enforcement. If the Secretary of the Treasury used his own judgment, as he did in this case, as to the enforcement of every law under which regulations are required to be made by him, and no judicial redress were permitted, the will of Congress expressed in legislation would be abundantly thwarted.

This would be most liberally exhibited by a comprehensive scrutiny of the entire body of existing statutes governing his duties; but it is sufficient to confine the examination simply to this statute. In thirty-nine other places, it authorizes regulations by the Secretary of the Treasury for various purposes connected with the customs and internal revenue laws. These are as follows:

Sugar, par. 182½, 2 Supp. R. S. p. 279,
the importer may be relieved from additional duty "under such regulations as the Secretary of the Treasury may prescribe."

Tobacco, par. 185, p. 280,
entry not to be made, except under regulations to be prescribed by Secretary.

Wines, par. 244, p. 285,
percentage of alcohol to be determined in such manner as the Secretary of the Treasury shall by regulation prescribe.

Animals for breeding purposes, free list, par. 373, p. 297,
Secretary may prescribe regulations for enforcing limitations to registered stock.

Cattle, &c., par. 373, p. 297,
may be brought from pasture free of duty under regulations to be prescribed by Secretary.

Animals for exhibition, par. 374, p. 297,
admitted free, but a bond shall be given in accordance with regulations prescribed by the Secretary.

Emigrants' teams, par. 374, p. 297,
free under such regulations as the Secretary may prescribe.

Casks and other articles returned from export, par. 387, p. 297,
proof of identity to be made under general regulations to be prescribed by Secretary.

Books, &c. for use of schools, libraries, &c. par. 413, p. 299,
subject to such regulations as the Secretary shall prescribe.

Indian goods, par. 582, p. 303,
free under such regulations as the Secretary may prescribe.

Theatrical scenery, &c. par. 596, p. 304,
admitted free of duty under such regulations as the Secretary may prescribe.

Works of art, par. 686, p. 307,
exemption subject to such regulations as the Secretary may prescribe.

Works of art, &c. par. 687, p. 307,
imported for encouragement of science, art or industry free under such regulations as the Secretary shall prescribe.

Works of art, par. 688, p. 308,
bond for payment of duties under such regulations as the Secretary may prescribe.

Trade-marks, §6, p. 308,
to be recorded in books under such regulations as the Secretary shall prescribe.

Materials for ship building, §7, p. 309,
may be imported in bond under such regulations as the Secretary may prescribe.

Articles for repair of American vessels, §8, p. 309,
to be withdrawn from bonded warehouses free under such regulations as the Secretary may prescribe.

Articles manufactured of imported materials, §9, p. 309,
shall be manufactured in bonded warehouses under such regulations as the Secretary may prescribe.
manufacturer to give bond for observance of such regulations as shall be prescribed by the Secretary.
materials used may, under the regulations of the Secretary, be conveyed into bonded warehouse.
articles may be withdrawn under such regulations as the Secretary may prescribe.

Machinery for repair, §13, p. 311,
Secretary directed to prescribe rules and regulations to protect against fraud.

Importation of neat cattle, §17, p. 312,
made duty of the Secretary to make all necessary orders and regulations to carry into effect.

Smelting works, §21, p. 312,
may be designated as bonded warehouses under such regulations as Secretary may prescribe.
ores may be removed under such regulations as the Secretary may prescribe.

refined metal may be removed under such regulations as the Secretary may prescribe.

Drawback on imported material, § 22, p. 313,

facts to be ascertained and drawback paid under such regulations as the Secretary shall prescribe.

Articles made by convict labor, § 24, p. 314,

Secretary authorized to prescribe necessary regulations.

Imported cigars, § 26, p. 314,

Secretary authorized to make all necessary regulations.

Income tax, § 34, p. 320,

annual tax returned, according to regulations to be prescribed by Commissioner and Secretary.

Playing cards, § 38, p. 323,

regulations as to dies and adhesive stamps by Commissioner and Secretary.

§ 43, p. 324,

may be exported free of tax under such regulations as Commissioner and Secretary may prescribe.

Distilled spirits, § 49, p. 326,

distiller may execute an annual bond under such regulations as Commissioner and Secretary shall prescribe.

Bonded warehouses, § 51, p. 328,

to be under such regulations as the Commissioner and Secretary may prescribe.

Spirits removed to general bonded warehouse, § 54, p, 328,

may be deposited under such regulations as shall be prescribed by Commissioner and Secretary.

Transporting from one bonded warehouse to another, § 55, p. 328,

to be under such regulations as Commissioner and

Secretary may prescribe.

bonds to be renewed at such times as Commissioner may by regulations require.

Alcohol in the arts, § 61, p 330,

manufacturer may use under regulations to be prescribed by Secretary.

Packages of rectified spirits, § 66, p. 331,

gauged, marked, etc., as the Commissioner and Secretary may by regulations prescribe.

Manufactured tobacco, § 69, p. 332,

to be put up in such packages as the Commissioner and Secretary shall prescribe.

The terms of the statute vary in these different provisions; but in general, the law either expressly declares, as in § 61, or implies, a positive duty on the part of the Secretary to make regulations. When these are examined, it will be seen that there is no substantial difference between the duty of the Secretary to make regulations under the other provisions and under that in § 61, except that in some of the others the word "may" is used instead of the more mandatory form in § 61.

The means of enforcement of the revenue laws are thus seen to be largely under executive regulation and the inference must be drawn that Congress does not intend, in giving direction to the Secretary to make regulations, that he shall first determine whether adequate regulations can be made or that the rights granted by the law shall be dependent upon his will. Otherwise he might make void the remaining thirty-nine provisions of the statute, as well as this fortieth provision as to which he declined to take action. He had no condition of fact to ascertain. He was directed to perform a duty and this he refused.

It was under a provision similar to that contained in

paragraph 373 of the free list of this act that this court in the case of *Morrill* v. *Jones*, 106 U. S. 466, declared that "all the Secretary of the Treasury can do is to regulate the mode of proceeding to carry into effect what Congress has enacted." Congress subsequently carried into law, in paragraph 373 of this same act, the very regulation of the Secretary of the Treasury which this court declared void in that case, just as Congress has since by the act of June 3, 1896 (2 Supp. R. S. 492; 29 Stat. L. 195), repealed § 61 of the act of August 28, 1894. But while that law was in force the Secretary had but one duty,—to obey the expressed will of Congress.

It is safe to say that in not a single other instance cited from the statute, has the officer charged with making regulations failed to prescribe complete regulations for the enforcement of the law, except in this case. The surmise can not be avoided that the true reason for not enforcing § 61 lay not in the difficulty, much less the impossibility, of framing regulations,—not in the absence of appropriations for their enforcement,—but in the desire of the Secretary of the Treasury to secure for a depleted treasury every possible dollar of revenue. However creditable such a desire might under some circumstances be, or with how much force he might properly have urged such considerations upon Congress, it was surely in no legal sense justified when placed in opposition to the plain requirements of the statute.

The Right Illustrated by Later Taxation.

It is an interesting fact that two classes of users of alcohol, perfumers and makers of medicines, who were given alcohol free of tax by § 61 of the act of 1894 are subjected to a stamp tax by the War Revenue Act of June 13, 1898, (Schedule B, 30 Stat. L. 462, 463) and are now paying both the tax on the alcohol

used and the stamp tax. It is an instructive reflection that, whatever the will of Congress as to their taxation, they have been constantly taxed because of the will of the Secretary of the Treasury. By the act of 1894, Congress said, "Do not tax," but they continued to pay tax because the Secretary of the Treasury declined to execute the legislative will. By the act of 1898, Congress said, "Tax," and, the Secretary of the Treasury executing the legislative will, they are taxed. But what if the Secretary had again in 1898, disagreed with Congress and refused to execute the law? Would they have gone untaxed? Would not the United States, when more zealous officers claimed the tax, have had a judicial forum for redress? None the less is one to be found here for the claimant in this case.

We are not left to conjecture as to the views of this court on the legal consequences of the case supposed,—the failure of an officer of the Government to make regulations for the assessment or collection of a tax. In *Dollar Savings Bank* v. *United States*, 19 Wall. 227, the law imposed a tax of five per cent on the earnings of certain banks, and provided for the assessment and collection of the tax by certain steps to be taken by the officers of internal revenue. No such steps were taken, the Commissioner of Internal Revenue in office at the time being of opinion that the bank was not liable to the tax. A subsequent Commissioner arrived at a different conclusion and, without making any formal assessment, had an action of debt instituted for the recovery of the tax. This court held that no assessment was a pre-requisite to liability, and said (pp. 240, 241):

"No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed, and the amount of the tax required of

each individual. It may be made by designated officers or by the law itself. In the present case the statute required every savings bank to pay a tax of five per cent on all undistributed earnings made, or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank, and without more it made the bank a debtor."

The operation of the taxing power of the United States upon the individual citizen is of the most direct character. Not only does the Constitution itself jealously guard the legislative power over taxation, but, as held in the decision just cited, all the revenue statutes of the United States are to be interpreted as acting directly and personally upon the citizen.

While the mistakes, laxity, or dishonesty of government officers may in actual practice result in a loss of revenue to the Government, no such result follows as a matter of law; and the tax remains no matter how negligent the revenue officers may be in taking the regular steps for its assessment and collection.

If the alcohol which forms the subject of the present suit had, through the negligence or connivance of officers of the Government evaded taxation at the time it was produced, this court would sustain an action for its recovery, even though not a single requirement of law or regulation had been observed by the officers of the Government. Similarly in this case, which involves the taxing power from the opposite point of view, the statute itself creates the freedom from tax; and the failure of the officers of the Government to take the necessary steps for ascertaining that freedom can constitute no bar to the direct relation which the statute itself has established between the manufacturer and the Government.

Under § 25 of the War Revenue Act of June 13, 1898,

(30 Stat. L. 457) the Commissioner of Internal Revenue is required to prepare suitable stamps for the payment of taxes there prescribed; but it has never been suggested that manufacturers who were unable to secure stamps, as was the case with many, shortly after July 1st, 1898, when the act went into effect, would be excused from payment of tax. On the contrary they were obliged to keep accounts and pay their taxes without regard to the failure of the Commissioner of Internal Revenue to do the acts required of him by law.

The only logical determination in all cases is that the judiciary shall enforce the laws decreed by Congress, whether executive officers be lax or overzealous in their execution.

The Objections of the Court of Claims.

The opinion of the Court of Claims is learned and elaborate, yet its gist is found in a very few words, giving the determination of the Court on the one point upon which the case is rested. This is as follows (Rec. 34, 35):

"The grant in the statute under consideration is the right to use alcohol 'under regulations to be prescribed by the Secretary of the Treasury,' and when so used it is to be exempted from taxation by a rebate or repayment of the amount of tax paid by the distiller. There can be no vested right in the manufacturer in the exemption of alcohol used by him unless it is used in pursuance to regulations prescribed by the Secretary of the Treasury, for the reason that the grant to him provides that he 'may use the same under regulations to be prescribed.' The prescription of the regulations by the Secretary forms a most essential part of the grant, and without the condition upon which the manufacturer is to have the exemption the grant fails. It may have been the duty of the Secretary to prescribe regulations (of that we express no opinion), but his failure to do so will not supply a necessary and essential element in the cause of the claimant. If the regulations 'to be prescribed by the Secretary of

the Treasury' form a part of the affirmative right of the claimant to the rebate, and the grant embodies as one of its essential elements such regulations, the want of such regulations can not be supplied by the failure of the Secretary to prescribe regulations."

Careful search fails to show that any of the previous reasoning of the opinion has any necessary logical relation to this conclusion. It is an expression of unreasoned opinion. Its force must rest upon the authority of the distinguished judges who concur in it and not upon its resultance from previous reasoning. Many matters are discussed in the opinion, pertinent to the case but not affecting the ground stated upon which the conclusion rests.

The Phraseology of the Section.

It is at once seen that this is a ruling based purely on the peculiarities in the phraseology of the act which the Court of Claims declares that it has discovered and is inconsistent with the second of the two purposes of the act stated by the court (Rec. 26)

"to favor the manufacturer by a rebate and repayment of the tax on all alcohol used by him in the course of his trade and business."

The Right Perfect on Claimant's Compliance with the Statute.

The result to which the Court of Claims arrived in its construction of this section involves a confusion between the duties which it imposes upon the manufacturer and those which it imposes upon the Government. Its requirements may be divided into five:

1. The manufacturer finding it necessary to use alcohol in the arts may use the same.

2. Regulations for such use are to be prescribed by the Secretary of the Treasury.

3. The collector of internal revenue for the proper district is to be satisfied of compliance with the regulations and the use of the alcohol.

4. The stamps showing payment of tax are to be exhibited and delivered up.

5. A rebate or repayment of the tax is to be made from the Treasury.

It is only the first and fourth of these requirements which are imposed upon the manufacturer, at least in the first instance. He must use alcohol for the purposes pointed out in the act, and this is the only condition imposed upon him in order to originate a valid claim against the Government. The fourth requirement, exhibiting and delivering up the stamps, must also be performed by the manufacturer. It goes, however, to the evidence of the claim, rather than to its validity. But the second and third are requirements made upon the Government itself.

"The Government is an abstract entity, which has no hand to write or mouth to speak. * * * It speaks and acts only through agents, or more properly, officers." *The Floyd Acceptances*, 7 Wall. 666, 676.

A default, therefore, of officers of the Government in the performance of something which the Government has taken upon itself to do is the default of the Government. True, the requirement as to regulations involves obedience to those regulations on the part of the manufacturer as a condition of his enjoying the benefit of the statute, after they have once been prescribed; and to that extent the second requirement is a requirement upon the manufacturer as well as upon the Government. The initiative, however, is upon the Government; and until

it, by the designated officer, has prescribed the regulations there is nothing to be performed by the manufacturer under that clause of the statute.

The same may be said of the third requirement. The duty is doubtless imposed upon the manufacturer of producing evidence to satisfy the collector of internal revenue. But, if the collector declines in advance to consider the evidence, there is no breach on the part of the manufacturer of any condition imposed upon him. The default in failing to take cognizance of the evidence is that of the Government, through the officer upon whom that duty is imposed. As little can the Government plead in bar of its obligations under the statute a non-compliance with the statutory requirements by its own officers, upon whom alone they are imposed, as it could plead the default of the Treasurer of the United States if he should refuse to comply with the fifth requirement, to pay the rebate from the Treasury, after the four preceding requirements had been complied with.

In no case, it is believed, has it ever been held that where by statute a promise was held out to a citizen conditional upon the performance by him of certain acts the Government can, in bar of a suit by him upon such promise and the full performance of the conditions, plead the non-performance by officers of the Government of requirements imposed upon them by the same statute. Yet, in the present case the defense of the Government must rest upon defaults of its own officers in the performance of the duties imposed upon them by this statute; for a performance by the claimant of every duty imposed upon him as a condition for obtaining the benefits of the statute has been fully established. That such a plea, of non-compliance by the Government with its own laws, can be set up in bar of the rights of the citi-

zen has been judicially denied in the numerous decisions hereinbefore referred to.

There is nothing in the phraseology of the present statute which in any degree takes it out of the rule thus laid down, or justifies the construction adopted by the court below, which in effect treats the absence of the regulations required by the statute as a non-compliance by manufacturer with the condition imposed upon him by the law.

The Phraseology not Different from Other Statutes Considered in Adjudged Cases.

The principle in all the acts construed in the decisions cited is the same as here. The thirty-nine other grants of authority to the Secretary of the Treasury in the same act can not be differentiated in substance. In every one the purpose of Congress is declared in the law; the Secretary is to determine the form and manner by which the end sought by Congress is to be ascertained. The words of the opinion in the *Campbell* case already quoted in full, are of direct application here (107 U. S. 413):

"Neither the act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector, or the Secretary, or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them."

Some strong reason must be shown why this provision should be held to intend something so different from all the others.

It can no more be said that the right to a rebate is here dependent upon the existence of regulations by the Secre-

tary than freedom from taxation was similarly conditioned in the statute considered in *Morrill* v. *Jones*, 106 U. S. 466, which provided that certain animals should be admitted free of duty "upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he may prescribe." The language considered in that case was, indeed, more nearly a grant of discretionary power in its use of the word "may" than is § 61 of the act of 1894, in using the more peremptory form of expression "to be prescribed," and the proof was in direct terms required to be "satisfactory to the Secretary." Yet this court held that no discretionary power was conferred upon the Secretary of the Treasury to restrict the class of animals named in the preceding part of the section, but that the regulation was void so far as it attempted to take away any right to import free of duty the class of animals named by the statute itself.

The language used in the statutes construed by the various Federal courts, already cited, required the proofs to be "under regulations." This is, indeed, exactly what is here required. The law prescribes the conditions of manufacture entitling to a rebate, —a "necessary" use "in the arts or in medicinal or other like compounds"; the amount of the rebate,— "the tax so paid," as shown by the stamps; and the essential evidence,—"exhibiting and delivering up the stamps." All that the Secretary could regulate is the mode of creating and preserving the evidence of the use of the alcohol. This not having been done by him the claimant has secured a determination by another, a judicial, tribunal of the very facts which the law directed the Secretary to ascertain by his regulations.

It has been said that in the case of *Campbell* v. *United States*, 107 U. S. 407, regulations had been made, but the officers of the Treasury refused to enforce them. The

distinction is not treated in the opinion as important. But even this can not be said of the case of *Railroad Company* v. *Smith*, 9 Wall. 95, quoted by this court in its opinion in the *Campbell* case (*ante*, p. 24). It had there been made the duty of the Secretary of the Interior to certify swamp and overflowed lands granted by act of Congress to the several States. The Secretary of the Interior had wholly failed to perform his duty under that act, and could doubtless have pleaded inadequacy of appropriations. This court, however, held that since the right had once been granted by act of Congress, the failure of an officer of the government directed to take proceedings to make the grant effective did not defeat the grant, but the party claiming its benefits might bring his case within the terms of the law by other evidence.

This brings the present case within the precise terms of the decision in that case. It is, indeed, stronger. The provision of the act in question in that case (9 Wall. 90), was "that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State." This was far more explicit in vesting a duty in the Secretary of the Interior than is the present act in defining the duties of the officers of the Treasury, yet it was held by the Supreme Court that a failure of the Secretary of the Interior, although due to the fact that he "had no satisfactory evidence under his control to enable him to make out these lists" (9 Wall. 100), could not be pleaded in bar of the direct grant made by the statute. The decision is the more striking from the fact that the statute provided that on the patent of the Secretary of the Interior "the fee simple to said lands shall vest in said State." Yet the Supreme Court held that the feesimple vested under the statute, without a patent,

when the Secretary refused to perform the duties required of him by the statute.

In *French* v. *Fyan* (93 U. S. 169) also cited in *Campbell* v. *United States*, this court held that where the Secretary had acted, the court would not review his action. It elaborated the meaning of the opinion and decision in the earlier case, saying (p. 173):

"The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act. The court said, 'The matter to be shown is one of observation and examination; and whether arising before the secretary, whose duty it was primarily to decide it, or before *the court whose duty it became, because the secretary had failed to do it*, this was clearly the best evidence to be had, and was sufficient for the purpose."

This makes very clear the immediate analogy between the case of *Railroad Company* v. *Smith* and the pending case.

It is a notable feature of the opinion of the Court of Claims that every case cited in it, on the subject of executive regulations under a statute, is in opposition to the theory upon which its decision is based. In no case has a judicial decision permitted a statute to be nullified by the failure of an executive officer to make regulations required of him for its execution. The Court of Claims, after citing six decisions to the contrary, proceeds to hold that there is a verbal difference between this and all other judicially construed statutes, demanding a different rule from any before applied. Surely the language of this act is not so unprecedented. Can a judgment be right, when founded on the idea that the case it decides is isolated, to be decided on different principles from any

that have governed the judicial determination of all prior cases?

The Court of Claims (Rec. 30, 34) attempts to point out a verbal difference between the language of this statute and the terms considered in *Campbell* v. *The United States*, *Morrill* v. *Jones*, and other cases, but makes no effort to point out any difference in the object and purpose of the regulations. The purpose of the regulations is the same in all these cases—the ascertainment of the quantity and the verification of the identity of the articles in question. The object is not the regulation of the manufacture, as the Government has no interest in this. When the legislative purpose is to take off the tax from alcohol used in manufactures and medicines, and the regulations are simply designed to ascertain the quantity so used, what reason can there be in assigning to such regulations an office of a more essential character than attributed to other regulations for a similar purpose under former statutes? A difference in two cases, to take the later one out of the rule of *stare decisis*, should not be a mere verbal difference in the language of the statutes but a substantial difference in principle, otherwise the judgment in the first case should form a precedent for that in the second. And this is particularly so where there has been, not one decision on a single statute, or even a series of decisions on the same language in different statutes, but a number of decisions on statutes varying in language, though, as the courts have held, similar in purpose.

An interpretation is always to be preferred by which an act is to be made effective. "*Interpretatio fienda est ut res magis valeat quam pereat.*" The interpretation by the court below makes the act wholly ineffective, and that by reason of executive disobedience to a plain legislative command.

V. CONSTITUTIONAL PRINCIPLES OF TAXATION INVOLVED.

There is another ground for the claimant's position that the rights granted him by law and denied by executive action can be secured by judicial relief.

An Exercise of the Taxing Power.

The act of August 28, 1894, is a law for raising revenue, an exercise of the taxing power. Sections 48, imposing a tax on distilled spirits, and 61, freeing alcohol used in the arts, are parts of the system.

The Taxing Power Exclusively in Congress.

The taxing power, by the written Constitution of this country, as by the unwritten Constitution of England, rests exclusively with the legislative authority. Since the days of Charles I no English sovereign has ventured to impose taxes without the consent of the nation in Parliament assembled. The story of English and American liberty is the history of the taxing power.

Had Congress directly provided that all alcohol produced for, and used by, manufacturers in the arts, or in any medicinal or other like compound, should be wholly free from tax, it would never be contended that the Secretary of the Treasury could, by making, or refusing to make, any regulations, impose a tax upon alcohol thus freed from tax.

But the legislation now before the court is in its purpose identical with that supposed, and merely differs in the mode of carrying out that purpose. Its object, as conceded by the Court of Claims (Rec. 26), was to make alcohol used in the arts free from internal revenue taxation. As a means to that end the tax is first paid and then refunded. The regulations required to be prescribed are a

mere step on the part of the Government in carrying out the design of the law. A failure to make such regulations, so far from absolving the Government from the obligation imposed upon it by the law to refund the tax, only brings into the case an element of violation by the Government of its own contract.

In the *Campbell* case (*ante*, p. 19), this court took this view of the drawback law, and says that the purpose of this provision is to make such imports duty free.

The Secretary of the Treasury himself evidently adopted the same view, notwithstanding his failure to provide regulations; for in an official communication he describes this section as "The provision of the act of 1894 *exempting from taxation* alcohol used in the arts and for medicinal purposes." Senate Ex. Doc. No. 34, 53d Congress, 3d Session.

Limitation on Executive Power over Taxation.

The extent to which Congress may grant discretionary powers to executive officers in matters of taxation is clearly illustrated by the recent case of *Field* v. *Clark*, 143 U. S. 649. In that case the constitutionality of the tariff act of 1890 was assailed on the ground, among others (p. 651):

"That section 3 of said act was unconstitutional and void, in that it delegates to the President the power of laying taxes and duties, which power, by §§ 1 and 8 of article I of the Constitution, is vested in Congress."

The section in question consisted of the famous reciprocity clause of that act and is as follows (1 Supp. R. S. 856; 26 Stat. L. 612):

"That with a view to secure reciprocal trade with countries producing the following articles, and for this

purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows, namely: "

The court sustained the constitutionality of this feature of the act, solely upon the ground that the power vested in the President was merely that of ascertaining certain facts in regard to the revenue regulations of foreign countries, and that the policy to be carried out was throughout that of Congress alone—the power exercised by the President being simply executive.

The following remarks (pp. 692, 693) plainly set forth the distinction drawn by the court between power to legislate and power to execute the legislation of Congress:

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses,

coffee, tea and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, 'he may deem,' in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequaled and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it can not be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event

upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

Even this moderate view of the powers which Congress might constitutionally vest in the President was taken by a majority of the court only. The Chief Justice and one of the associate justices dissented, on the ground that the section in question did invest the President with legislative power over the revenues in violation of the constitutional grant of power to Congress.

There can be found no likeness between § 3 of the act of 1890 and § 61 of the act of 1894.

The power of removing certain articles from the free to the dutiable list was in the act of 1890 expressly conditioned upon the ascertainment by the President of the existence of unequal and unreasonable regulations by foreign countries. It was upon the sole ground that the President was merely authorized to ascertain certain facts as to the legislation of foreign countries, and upon the declaration of such an ascertainment the articles named in the act were to become subject to duty, that the court upheld the legislation.

There was no intimation whatever in § 61 of the act of 1894 of any intention on the part of the legislature to vest in the Secretary of the Treasury a power to ascertain whether adequate regulations could be framed or not. The use of the alcohol is to be "under regulations to be prescribed by the Secretary of the Treasury," not "if the Secretary of the Treasury shall prescribe regulations,"—not, "if the Secretary of the Treasury shall ascertain whether adequate regulations for the protection of the

revenue can be framed," but "under regulations *to be* prescribed," that is, which the Secretary of the Treasury shall prescribe.

Any construction of this legislation which would in effect leave it discretionary with the Secretary of the Treasury to tax, or not to tax, alcohol used in the arts and manufactures would render the section unconstitutional and void.

By article one, § 8, of the Constitution, "The Congress shall have power to lay and collect taxes, duties, imposts and excises," etc. Under this provision the power of taxation must be exercised directly by Congress itself, and can not be delegated to any other branch of the Government. All that executive officers can do under provisions for taxation is to supply regulations to carry into effect what Congress has enacted, as decided by the Supreme Court in *Morrill* v. *Jones*, 106 U. S. 466, above referred to, or to ascertain the existence of facts upon which provisions of law may take effect, as in the case just discussed.

To the same effect are State decisions. We cite the syllabus of the decision of the Supreme Court of Maine in *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62, as follows:

"It is for the legislature to determine what property, real and personal, shall be subject to, and what shall be exempted from taxation.

"The legislature can not constitutionally transfer to municipal corporations the power of determining upon what property, real or personal, taxes shall and upon what they shall not be imposed."

Also from the case of *State* v. *Hudson County Commissioners*, 37 N. J. Law, 12, 13, 19, 20:

"It is illegalized, from the presence in it, of a delegation to this official body of powers which can be exercised by the legislature alone, and which are not, in their

nature, transferable to any other branch of the government or its agents (p. 13).

"The legislature has transferred to these Commissioners a part of the law-making power. A legislative act of taxation, in order to be legal or effective, must consist of something more than a mere declaration that a certain sum of money shall be raised out of the property within a county. Itself must distribute the burthen. This is as essential as the designation of the amount to be raised. And not only the sum required must be stated, and the property out of which it is to be made designated, but also some certain standard of assessment must be established. No act of taxation can omit any of these components. If the legislature of this State should ordain that a tax of a certain amount should be levied, to be distributed among the counties of the State, in such proportions as the treasurer, in his discretion, should direct, it would not probably be denied by any one, that such an act would be entirely inoperative" (pp. 19, 20).

A Constitutional Construction to be Preferred.

Possibly it will be contended that Congress may have meant by this act to make an unconstitutional delegation of power to the Secretary. Of course, if Congress had in express terms enacted that alcohol used in the arts should be taxed or not, at the discretion of the Secretary of the Treasury, the court would only have to decide whether Congress could thus constitutionally delegate the power of taxation. If, following the uniform line of decisions to that effect, it were held that it could not constitutionally be so delegated, the act would have to be declared void. That, however, is not the present case; for Congress has in language substantially similar to that repeatedly employed in revenue statutes, provided for a remission of the tax on alcohol used in the arts "under regulations to be prescribed by the Secretary of the Treasury." The only question is, shall the clause requir-

ing regulations be treated as subordinate to the main object of the section, vesting in the Secretary the power simply to carry out by reasonable regulations the purpose of the section, or shall it be construed as an unconstitutional delegation of the discretion to tax, or not to tax, to the Secretary of the Treasury?

The number of instances in which acts of Congress have been held unconstitutional is very rare, and the purpose to pass an unconstitutional statute is never imputed to Congress unless every other hypothesis is excluded by the unmistakable character of the language employed.

Such a construction will, therefore, be rejected by the court; for where a statute is open to two constructions, one of which would render it constitutional and valid, and the other unconstitutional and void, the courts, with a view to upholding what the legislature has enacted, will always adopt the former. *Presser* v. *Illinois*, 116 U. S. 252, 269.

In the present instance the power, which the Secretary of the Treasury has in effect asserted by his refusal to make regulations, is a power claimed for himself, an executive officer, to tax an article which Congress has said shall be free of tax.

To admit the existence of such a power is to disregard the fundamental division of powers between the legislative and executive departments of the government as established by the Constitution, and ever since maintained.

VI. THIS SECTION NOT A STATUTE OF EXEMPTION.

Some positions are taken by the Court of Claims apparently as arguments leading up to their conclusion

that the regulations were an essential pre-requisite to claimant's right. These are:

1. That this section is a statute of exemption and must be strictly construed (Rec. 33).

2. That the failure of Congress to make an appropriation to carry out §61 and its subsequent repeal by the act of June 3, 1896 (29 Stat. L. 195), were a legislative construction of the act of 1894, that regulations were essential to its operation (Rec. 35).

These will be severally considered.

Extent of Rule of Strict Construction.

The Court of Claims relies upon the well-known rule laid down in the case of *Winona and St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, "that statutes exempting property from taxation are to be strictly construed."

The rule was intended to apply only to cases where the property of a particular person or corporation was singled out for exemption. It has no application whatever to a case where an article previously subject to taxation has by a new statutory provision been relieved from tax, and where the repeal of the tax operates upon all persons and corporations alike.

It has already been seen that §61 is the adoption of a new policy of taxation of distilled spirits, already in force in other commercial countries, repeatedly urged in this, and based upon the reason, and not the accidents, of the thing taxed. The duty of the courts, in interpreting a statute initiating such a policy is to give intelligent effect to its purposes, so far as fairly expressed in the terms used.

If Congress in the original imposition of internal revenue tax on distilled spirits had placed that burden only upon those intended for use as a beverage, it would not be claimed that those destined for use in the arts were

in any just sense of the term placed within a privileged or exempted class. They would simply not be within the class of taxable articles. In like manner when Congress in 1894 for the first time in the history of our internal revenue system adopted the rule of distinguishing between spirits used for beverages and those used in the arts, and enacted that the burden of such taxation should fall exclusively upon the former class, there was no special exemption of the latter. All persons bringing themselves within the terms of § 61 are at perfect liberty to use alcohol under its provisions, and, if they do so, are guaranteed by the section freedom from taxation. That this freedom is brought about, not by original absence of tax but by first collecting and then refunding the tax, can make no difference in principle.

So far from coming under the rule that a statute granting a special exemption is to receive a strict construction, this section comes rather under that other well-settled rule that express language is required to authorize the imposition of a tax. As was said in *United States* v. *Watts*, 1 Bond, 580:

"It is the duty of the courts of the Union, undoubtedly, so far as they are invested with any agency in carrying out the financial purposes of the government, fairly to enforce the revenue laws of the country, and see that they are not fraudulently evaded. But they are not at liberty, by construction or legal fiction, to enlarge their scope to include subjects of taxation not within the terms of the law."

In *American Net and Twine Company* v. *Worthington*, 141 U. S. 468, 474, it was said:

"Were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in a clear and unambiguous

language. *United States* v. *Isham*, 17 Wall. 496; *Hartranft* v. *Wiegmann*, 121 U. S. 609; *Gurr* v. *Scudds*, 11 Exch. 190."

In *United States* v. *Isham*, 17 Wall. 496, 504, the rule was thus stated:

"If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Gurr* v. *Scudds*, 'a tax can not be imposed without clear and express words for that purpose.'"

In *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616, it was said:

"If the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on the citizen upon vague or doubtful interpretations.' *Powers* v. *Barney*, 5 Blatchford, 202; *United States* v. *Isham*, 17 Wall. 496, 504; *Gurr* v. *Scudds*, 11 Exch. 190, 191; *Adams* v. *Bancroft*, 3 Sumner, 384."

Judge Lacombe in *McCoy* v. *Hedden*, 38 Fed. Rep. 89, 91, referred to this rule as,—

"The familiar principle of law that the property of the citizen shall not be taken on ambiguous and doubtful construction."

The present statute is entitled to the same liberality of construction as applied to those cited, and should not be construed as subjecting alcohol used in the arts to a burden of taxation which Congress manifestly desired to remove.

Perhaps the fullest statement of the rule is in the case of *Rice* v. *United States*, 53 Fed. Rep. 910, 912:

"The rule for the construction of statutes levying taxes or duties on the citizen is laid down by Lord Cairns, in delivering the judgment of the House of Lords (*Partington*

v. *Attorney General*, L. R. 4 H. L. 100, 122) in this language:

"'As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an "equitable construction," certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'

"Judge Story says:

"'It is a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specially pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws, or laws founded upon any permanent public policy, and therefore are not to be liberally construed.' *U. S.* v. *Wigglesworth*, 2 Story, 369.

"And this is the uniform doctrine of the authorities. *Net & Twine Co.* v. *Worthington*, 141 U. S. 474; *U. S.* v. *Isham*, 17 Wall. 496; *Hartranft* v. *Wiegmann*, 121 U. S. 609; *Powers* v. *Barney*, 5 Blatchf. 202; *Dean* v. *Charlton*, 27 Wis. 526; Suth. St. Const. 461, 462; Cooley, Tax'n, (2d Ed.), 266; Dwar. St. p. 749."

The principle here stated fully applies to a case of rebate like this, for the analogous instance of a drawback of customs duties is likened by the Supreme Court to a case in which the goods were made free of duty.

"The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free, and we see no gratuity in the case." 107 U. S. 413.

VII. NO LEGISLATIVE CONSTRUCTION.

The Court of Claims has said (Rec. 35) that there has been a legislative construction by Congress of § 61, arising from two facts:

(1) That at the first session after the enactment of the law and the failure of the Secretary to prescribe regulations, he communicated to Congress the fact that no regulations had been prescribed and that Congress with attention invited to his failure, made no provision to meet the condition mentioned in the report (Rec. 9).

(2) That after a delay of nearly two years, on June 3d, 1896 (29 Stat. L. 195), Congress repealed § 61.

The Failure to Make Appropriation.

There is no authority to be found in the whole range of judicial decisions for the position that mere silence on the part of a legislative body can be regarded as an affirmative act, putting a construction upon its previous legislation. Legislative bodies act only through measures of legislation passed in the forms prescribed by the Constitution. The fact that they do not act upon a particular subject may be due to such a great variety of causes other than an affirmative desire not to act upon it, that it can never be safely adopted by the courts as a ground of judicial decision. The well known difficulties in obtaining action by Congress on any subject, arising in no small degree from the fact that in the House of Representatives legislation is wholly in charge of the committees and largely under control of the Speaker, and that in the Senate the right of debate is practically unlimited

and can be, and is, used as a means of obstruction, repel the idea that the failure of Congress to act upon any subject is due to a deliberate desire to withhold action thereon.

No Estimate by Secretary.

The failure of the Secretary of the Treasury to prescribe regulations was placed by him upon the ground that "no appropriation whatever, either special or general, has been made by Congress for the purpose mentioned or for any other purpose connected with the execution of the section of the statute referred to." (Finding VII, Rec. 7.)

He failed to give to Congress any estimate for an appropriation in the manner required by law.

The act of July 7, 1884, paragraph 2, 1 Supp. R. S. 470, 23 Stat. L. 254, provides as follows:

"And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner;

"And the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department."

In estimating for the expenses of the income tax imposed by this same act and transmitting his estimates to Congress (H. R. Ex. Doc. 13, 53d Cong. 3d Sess. p. 4) the Secretary was careful to follow exactly these directions.

The Court of Claims has inserted in the findings (Rec. 9) a statement from the annual report of the Secretary of the Treasury for 1894 that "the expenses of the necessary offi-

cial supervision will not be less than $500,000 per annum." But in a foot-note to the same report (apparently overlooked by the Court of Claims, as it is omitted from the findings), he raises this to an even million (Rep. Sec. Treas. 1894, p. LXVI). The Commissioner of Internal Revenue on November 28, 1894, stated it at "not less than $500,000" (Report Sec. Treas. 1894, p. 975), but on May 9, 1895, increased this sum (Report Sec. Treas. 1894, p. 992) to $1,000,000 in one passage of a communication of this date and to $10,000,000 in another passage of the same communication.

In the communications thus informally placed before Congress on this subject, the Secretary failed to give any consistent or even intelligent statement of the amount probably requisite for carrying out this law.

It is not to be wondered at that Congress should have failed to make an appropriation in view of the varying statements of the amounts required based upon what is manifestly nothing better than guesswork.

It is a matter of judicial knowledge that the appropriation bills are framed upon formal estimates made as required by law, and that mere recommendations made in a general manner in the annual report, or in miscellaneous communications to Congress, are seldom, if ever, regarded by the committees in making up the appropriation bills, even if in order under the rules of the two Houses.

The correctness of this position is shown by the fact that a proposition in the Senate to make an appropriation for this very purpose was laid on the table on the precise ground that no Treasury estimate had been submitted for it (Cong. Rec. 53d Cong. 3d Sess. part 2, page 1027).

From the failure of Congress to make appropriations for which no formal estimate was ever submitted by the Department no conclusion unfavorable to the continued

force of the law can be drawn. It may just as well be said that it was due to the legislative opinion that existing appropriations were available for use under § 61. It will hereafter be shown that this was the case (*post*, p. 76).

The Repeal of Section 61.

Were it not for the position taken in the opinion of the Court of Claims, it would not be thought necessary to treat seriously the suggestion that the repealing act of 1896 constituted a legislative construction of the repealed act of 1894. What means had the 54th Congress, which passed the repealing act, of knowing what was the intention of the 53d Congress, composed largely of different members, which passed the repealed one? What is there in the act of 1896 which in any manner indicates a view of that of 1894 inconsistent with its being valid legislation? The first section of that act repealed the act of 1894; the second authorized and directed the appointment of a joint select committee to consider all questions relating to the use of alcohol in the manufactures and arts free of tax. If this act indicated anything at all, as to the construction of the prior legislation, it was in favor of the policy of free alcohol in the arts and indicative of a purpose on the part of Congress to resume in some form the same policy of freedom from tax. In truth, however, the repealing act of 1896 is valueless as a legislative construction either way of that of 1894. Rights had by that time become vested upon which the courts alone could pass and which Congress was powerless to divest by any new legislation, whether under the guise of legislative construction of a prior law or otherwise.

It has already been pointed out (*ante*, p. 44) that after the Secretary of the Treasury had made the regulation pronounced unlawful by this court in *Morrill* v. *Jones*,

106 U. S. 466, Congress by a later revenue act, made the Secretary's regulation a part of the law; but it was never suggested that the effect of the new enactment was to put a legislative construction on the old law confirming the Secretary's regulation.

It is only necessary to ask, in order to show the fallacy of this line of argument, what were claimant's rights between April 24, 1895, when this claim had entirely accrued, and June 3, 1896? Were they in any wise different before and after the latter date? Any attempt to answer these questions destroys at once the argument based on a supposed legislative construction.

If § 61 was valid legislation at the moment of its enactment (and the contrary is not claimed) when did it cease to be such? On the first Monday of December, 1894, when the Secretary of the Treasury informed Congress that he could not or would not execute it? On the 3d of March, 1895, when the 53d Congress adjourned without taking any action on that report? The impossibility of assigning any of these or other dates that might be suggested leads to the only answer that legal principle will justify, viz.: that the section ceased to be in force on June 3, 1896, when Congress by a valid act passed in the forms prescribed by the Constitution, repealed it.

VIII. THE RELATION OF REGULATIONS AND APPROPRIATIONS.

The Objection of the Treasury Department.

The ostensible reason of the Treasury Department for failing to make regulations (Rec. 8, 9) was that regulations could not be made without supervision, and supervision could not be undertaken without appropriation and Congress had made no appropriation.

There are two sufficient answers to this proposition:

(1) That it was the duty of the Secretary of the Treasury to make and enforce such regulations as were within his statutory powers.

(2) That adequate appropriations existed for this purpose.

The Secretary's Duty to Make Regulations as far as Permitted by Existing Law.

The true rule for executive officers in the enforcement of all laws was tersely stated by the late Justice Lamar while Secretary of the Interior, in his instructions to the Commissioner of the General Land Office (Land Office Report, 1887, p. 311):

"What the statute confers the statute means to be enjoyed. What the statute directs it means to have done. Not to do it, or even to delay unnecessarily the doing of it, is to violate the statute and involves a grave dereliction of duty."

It is believed that no court has ever applied to the enforcement of any statute the delusive test of inadequacy of appropriation or impracticability of administration.

The duty to prescribe regulations being cast by Congress upon the Secretary of the Treasury, he should have done whatever statute permitted him. The responsibility for the law was on Congress. If his powers were inadequate and later experience so showed, the responsibility was with Congress after the Secretary had used all available means to carry out the law.

The Act Implies all Powers Necessary for its Execution.

"Every statute is understood to contain, by implication, if not by its express terms, all such provisions as

may be necessary to effectuate its object and purpose, or to make effective the rights, powers, privileges, or jurisdiction which it grants, and also all such collateral and subsidiary consequences as may be fairly and logically inferred from its terms." Black on Interpretation of Laws, p. 62.

A strong instance of this character is found in repeated decisions of the Supreme Court of the United States, that where municipal corporations are authorized to borrow money, without provision for payment of the loan, the acts authorizing the loan by implication confer power to levy a tax for its payment. *United States* v. *New Orleans*, 98 U. S. 381, 393; *Ralls County Court* v. *United States*, 105 U. S. 733. It was said in the former of these cases:

"When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation. 'It is therefore to be inferred,' as observed by this court in *Loan Association* v. *Topeka* (20 Wall. 660), 'that when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.'"

The Supreme Court of New York applies the same rule in two well-considered cases, from which we quote as follows:

"Whenever a statute grants the power to do an act, with an unrestricted discretion as to the manner of ex-

ecuting the power, all reasonable and necessary incidents in the manner of executing the power are also granted." *People* v. *Eddy*, 57 Barb. 593.

"When a power is given by statute, everything necessary to make it effective, or requisite to attain the end, is implied. 1 Kent Com. (5th ed.) 464. So, where the law commands a thing to be done, it authorizes the performance of whatever may be necessary for executing its commands. *Foliamb's Case*, 5 Coke, 116." *Green* v. *Mayor of New York*, 2 Hilton (N. Y.) 203, 209.

In the recent case of *United States Electric Lighting Company* v. *Commissioners of the District of Columbia*, 24 Wash. Law Rep. 775, 777, this rule was applied. It was held that a requirement that certain streets and public parks should be lighted by electricity, had the effect of conferring upon the Commissioners of the District the power to grant to the electric lighting company accepted as the successful bidder for such work, permits to open the streets to lay wires for that purpose, although, by acts previously in force, this power was withheld. The court thus reasoned:

"This being so, if the Commissioners have no general power to permit wires to be laid under the surface of the streets, that part of the law authorizing 'extensions of such service' in the District bill, and the lamps in parks in the Sundry Civil bill, would be a nullity, unless the statute creates an implied power in the Commissioners to permit the laying under the surface of some streets the wires necessary to supply such additional service. Such implication is in accordance with the rule of interpretation that where authority is given by a statute to do a particular thing, it confers all powers necessary for the accomplishment of the main purpose, and that whatever is thus necessarily implied in a statute is as much a part of it as what is expressed therein. This rule has been stated and applied by the Supreme Court in numerous cases, amongst which the following may be cited:

"*U. S.* v. *New Orleans*, 98 U. S. 393–4; *Ralls Co. Court* v. *U. S.* 105 U. S. 735–6; *U. S.* v. *Babbitt*, 1 Black, 61; *Gelpeche* v. *Dubuque*, 1 Wall. 221."

In the light of these decisions, it can not be said that the Secretary was left helpless, even if no appropriation existed. Indeed it might even be said, if it were necessary to go so far, in the determination of this case, that if, as contended by counsel for the United States, no appropriation existed enabling the Secretary to carry out regulations to put the section into force, and the only possible regulations absolutely required expenditures he could have provided by regulations for the payment of the expenses by those claiming the benefit of the act.

Appropriations Were Available.

It is beyond question, however, that at the time of the passage of the act of August 28, 1894, appropriations were available to pay the expenses of inspecting and supervising the use of alcohol under § 61 of that act.

Analysis of Internal Revenue Appropriations.

The general tendency in making appropriations is toward a strict specification of the objects of appropriation, limiting the executive discretion. A different plan has been followed in regard to the expenses of the Internal Revenue system. Beside certain minor permanent and indefinite appropriations provided for by Rev. Stat. § 3689, to pay drawbacks on exportation of articles upon which Internal Revenue tax had been paid, to refund taxes illegally collected and to redeem stamps, the entire expenses of the Internal Reveuue system for the year ending June 30, 1895, were provided by the following appropriations:

By act of July 31, 1895, making appropriations for the

legislative, executive and judicial expenses (28 Stat. L. 162):

For the official force in the office at Washington, $261,590 (p. 177).

For stamp agent and counter, $2,500 (p. 177).

"Collecting Internal Revenue.—For salaries and expenses of collectors and deputy collectors and clerks, including transportation of public funds, and also including expenses incident to enforcing the provisions of the Act of August 2, 1886, taxing oleomargarine, and the Act of August 4, 1886, imposing upon the Government the expense of the inspection of tobacco exported, and any necessary expenses under the Act of October 1, 1890, respecting bounty on sugar," $1,710,000 (p. 180).

"For salaries and expenses of agents and surveyors, fees and expenses of gaugers, salaries of storekeepers, and for miscellaneous expenses," $1,900,000 (p. 181).

By act of August 18, 1894, making appropriation for sundry civil expenses (p. 372):

"For detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws or conniving at the same, including payments for information and detection of such violations," $50,000 (p. 388).

General Appropriations Always Used for all Internal Revenue Purposes.

While the chief appropriation is by title, for "Collecting Internal Revenue," the actual operations of the internal revenue laws embrace many acts not strictly of collection, but incidental to the system. These will be referred to in detail hereafter. Many of these are very similar to the acts required of the Internal Revenue Bureau by § 61, refunding of taxes already paid or the release from taxation of alcohol used for specific purposes. The expenses of all such incidents to the

collection of internal taxes have been uniformly, for many years, paid from the appropriations cited above. There have been no other appropriations. The internal revenue laws have been construed as one system and the appropriations as made have been considered available not only for their primary object, "Collecting Internal Revenue," but for all the minor incidents of the system, even if not strictly collecting. Such an object, for which the appropriations were equally available, was the supervision of refunding taxes under § 61.

The practice of the Treasury Department in thus construing these appropriations is authoritative and, in the light of the uniform usage of many years and for many purposes, the position of the Secretary as to §61 was singularly inconsistent and difficult to explain on a theory of a real desire to execute the law.

Some of these incidental requirements of the internal revenue laws for which these general appropriations are, and have long been used, may be detailed as follows:

a. ALCOHOL FREE OF TAX ON EXPORTATION.

By § 3329, Revised Statutes, as amended by § 10 of the act of May 28, 1880 (1 Supp. R. S. 287; 21 Stat. L. 148), distilled spirits, upon which taxes have been paid, may be exported with the privilege of drawback. By § 3330, as amended by the act of June 9, 1874 (1 Supp. R. S. 12; 18 Stat. L. 64), and § 11 of the act of May 28, 1880 (1 Supp. R. S. 287; 21 Stat. L. 148), distilled spirits may be withdrawn from bonded warehouses and exported without payment of taxes. Like provision is made by § 5 of the act of March 3, 1887 (1 Supp. R. S. 140; 19 Stat. L. 394), as to fruit brandy.

Section 3161, Revised Statutes, provides for the appointment and duties of a superintendent of exports to carry out § 3329, under certain conditions, although the

duties required of him are to be performed, in his absence, by the Collector. The Collector is also obliged, by § 3444, to render a monthly account to the Commissioner of taxed articles exported in bond.

There were 6,114,417 gallons of distilled spirits exported under § 3330, in bond without payment of tax, in the year ending June 30, 1894 (Finance Report, p. 664). The removal of such spirits from bonded warehouses consumes the time of revenue officers stationed at those warehouses, and it requires supervision in transit or on export. The duties thus performed are not in the strictest technical sense performed in "collecting internal revenue." They are performed in freeing certain classes of otherwise taxable articles from the internal revenue tax. It is the opposite of collecting internal revenue; it is seeing that revenue is not collected. Yet no separate appropriation is required and no separate set of officers. The duties are performed by the collectors and their subordinate officers who are paid out of the appropriations for "collecting internal revenue." R. S. § 3678 says:

"All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

But this prohibition has never been considered applicable because the drawback or the exportation in bond is an incident arising out of the fact that internal revenue is collected. It is a part of the system.

It is specially provided in the general appropriation (*ante*, p. 77) that it shall be available for expenses incident to the inspection of tobacco exported under the act of August 4, 1886 (1 Supp. R. S. 511; 24 Stat. L. 218), which are the same in character but less in amount than those incurred in the inspection of distilled spirits exported. Yet

no watchful Comptroller of the Treasury has thought to declare that the expression in the appropriation that the expenses of inspecting exported tobacco shall be borne from the appropriation for "collecting internal revenue" excludes the payment from the same appropriation of like expenses in the inspection of exported distilled spirits.

b. MANUFACTURING IN BOND FOR EXPORT.

Revised Statutes, § 3433, as amended by § 10 of the act of October 1, 1890 (1 Supp. R. S. 858; 24 Stat. L. 218), and § 9 of the act of August 28, 1894 (2 Supp. R. S. 309; 28 Stat. L. 548) provides for the manufacturing in bonded warehouses for export of articles made in whole or in part of materials subject to internal revenue tax. Under this statute, both tobacco and distilled spirits are used in manufactures, without payment of tax; the one for cigars and snuff, and the other for perfumery, medicinal preparations and alcoholic cordials.

The superintendents of these bonded warehouses are under the customs service, yet there must be a withdrawal for export from the distillery warehouse as under § 3330 and due superintendence of the lading of the distilled spirits and supervision to prevent their going into the open market before reaching the bonded manufacturing warehouse. The provisions of § 3444, requiring a return of goods withdrawn and a report to the Commissioner by the collector must be observed in regard to these distilled spirits.

These duties require the time and services of subordinate officers of the internal revenue stationed in the vicinity of the distillery warehouses. The law provides no other officers and no other appropriation than those under the head of "Collecting Internal Revenue" to accomplish this result, yet these acts are not concerned with the collection, but with seeing that the internal

revenue tax is not collected Nevertheless, the general appropriation for collecting internal revenue is equally available and has equally been used for this purpose as for the more direct object of securing the payment of the tax on distilled spirits not made free by law.

c. FREE ALCOHOL IN VINEGAR FACTORIES.

Under the provisions of R. S. § 3282, acts of March 1, 1879, and June 14, 1879 (1 Supp. R. S. 231, 266; 20 Stat. L. 335; 21 Stat. L. 20), alcohol, from which vinegar is made, is manufactured free of tax in vinegar factories. Some supervision is exercised by internal revenue officers to prevent this free alcohol from reaching the open market in fraud of the revenue laws. This is never the subject of taxation. If an attempt is made to use it for other purposes than for vinegar, it is not taxed, but forfeited. No collection of an internal revenue tax is made under any circumstances on alcohol made in a vinegar factory; it is either free or wholly forfeited. Yet the inspection of such factories is paid for out of the general appropriations already detailed for collecting internal revenue.

d. FREE ALCOHOL FOR SORGHUM SUGAR.

Alcohol is granted free of tax for the manufacture of sorghum sugar under the act of March 3, 1891 (1 Supp. R. S. 930; 26 Stat. L. 1050). The Treasury Department has made elaborate regulations (Series 7, No. 7, Revised Supplement No. 1, 1891) for enforcing this law, and in these provides for expenses, all of which are to be borne from the appropriation for collecting internal revenue and for duties all of which are to be performed by the ordinary officers of internal revenue.

If the position of the Secretary of the Treasury as to § 61 was correct, that the law contemplated an appropriation in order to become an effective grant, and that the

appropriations for collecting internal revenue or for the service of officers then authorized were not available under this act, then similar action should have been taken under the act of March 3, 1891, and no regulations issued until Congress made a special appropriation or provided that the regular appropriations might be used under this law.

It is no answer to this to say that the duties under the act of March 3, 1891, might be performed by the existing corps of revenue officers, while those under § 61 could not be so performed. If the expenses of supervising the use of alcohol under this act were not properly payable from the appropriations for "collecting internal revenue," then it would be an unlawful diversion of the appropriation not only to pay the incidental expenses but to apply the services of the officers paid from it to this unwarranted use. The Secretary regarded neither act as unlawful and provided for the use of this appropriation and for the services of officers paid under it, for all purposes connected with the act of 1891. It was likewise his duty, if Congress gave him no additional official force, to endeavor to perform the additional duties imposed by § 61 with his available force and to report to Congress in due form the necessity for an increase, if he found their adequate performance impossible.

e. FREE ALCOHOL FOR SCIENTIFIC INSTITUTIONS.

While but a small amount of additional labor may be required under Revised Statutes, § 3297, and the act of May 3, 1878 (1 Supp. R. S. 159; 20 Stat. L. 48), providing free alcohol for scientific institutions, yet the collectors and other officers of internal revenue paid out of the appropriations for "collecting internal revenue" have no right to perform these services and to pay for them out of this appropriation, if not properly within the object of appro-

priation, although this has been the uniform practice of years. This practice shows that the principle has continuously been accepted that the appropriation for "collecting internal revenue" is not confined strictly to the mere collecting, but is equally available to the duties incidental to it, imposed by law upon internal revenue officers.

f. FREE ALCOHOL FOR FORTIFYING SWEET WINES.

The report of the Commissioner of Internal Revenue for the fiscal year ending June 30, 1896, states that there were distilled from grapes during that period in the United States (p. 67) 2,121,625 proof gallons of spirits. Of that quantity the Commissioner of Internal Revenue delivered free of tax (p. 197) under the act of October 1, 1890, §§ 42–49 (1 Supp. R. S. 866; 26 Stat. L. 621) as amended by the act of August 28, 1894, § 68 (2 Supp. R. S. 331; 28 Stat. L. 568) 1,527,962 proof gallons to be used in the fortification of sweet wines. Domestic wines not only paid no tax, but these statutes permit grape brandy or wine spirits (a product taxable as alcohol or distilled spirits under Rev. Stat. §§ 3248, 3254, 3255) to be added to sweet wines to an alcoholic strength of fourteen per cent producing after fortification, not exceeding twenty-four per cent of alcohol.

A very large amount of work is necessary in the execution of this law, on the part of employees paid under the appropriations for collecting internal revenue. Where the wine maker is also a distiller (§ 42) and uses the spirits distilled by himself, some of the services in connection with this tax-free alcohol may be, but need not be, performed by internal revenue employes already detailed to his distillery. Other users (§ 45) who are not also distillers require the special detail of an officer to their wineries to supervise the use of the spirits.

The Regulations (Series 7, No. 5) provide for filing a bond in duplicate with the Collector, one copy of which is sent to the Commissioner of Internal Revenue, for notice of intent to use spirits, for permits for removal, for a fortifying room under the control of an officer detailed by the Collector of Internal Revenue, for gauging, sampling and supervising the fortification of wines; for mixing under due supervision, for stamping by the official gauger and removal under his supervision; and for a report in duplicate to the Collector, who must forward one copy to the Commissioner. Samples must also be sent the Commissioner for analysis. Where the producer of sweet wines is not a distiller, he has to advise the collector of the distillery warehouse from which he desires to withdraw spirits and of the particular packages of grape brandy which he desires to withdraw. The Collector must send a gauger to examine and report upon them, an entry for withdrawal has to be made and an exact statement of the route in transportation from the special bonded warehouse to the winery must be made, the shipments to be made, where practicable, over bonded routes. An official permit is given by the Collector, the gauger affixes transfer stamps upon the packages and cuts or burns the name of the distillery, the district and other particulars. The store-keeper delivers the spirits to the party named in the Collector's certificate and the wine maker must deliver to the Collector through bills of lading, the carrier agreeing to transport the packages in bond. The Collector forwards one copy of the bill of lading to the Commissioner of Internal Revenue and proof must be made of the delivery of spirits at the winery within the time specified in the bond. On its arrival, notice must be given to the Collector, and the gauger must then supervise the fortification, as in the case of the distiller who is also a producer. For the ex-

pense of all this supervision, the general appropriations for "collecting internal revenue" are alone available and have uniformly been used. Yet this is not in a strict sense "collecting"; it is an incident of the internal revenue system.

The argument applies equally in the case of supervising tax-paid alcohol used in the arts, upon which a rebate was to be paid under § 61. The Collector's duties do not end with mere collection. He has to hold and protect the funds and see that they reach the Treasury. It would not do for him, having once collected the revenue, to say that some one else must take care of it. While he has to defend it from the direct assaults of burglars, it is equally his duty to defend it from any attempt to secure its refund or rebate unlawfully. It is consequently a necessary part of its collection that an unlawful attempt to take it out of the Treasury should be resisted. While the Collector and other revenue officers, as an incident to their duties under the free alcohol law for sweet wines, watch the alcohol until it is mixed with the wine, because a tax is payable if not so mixed, so also they are required to watch the alcohol on which the tax has already been paid until actually used in the arts; because, if not so used, the amount collected remains in the Treasury, or, if subsequently re-distilled, a tax or penalty must be paid on it.

The rectification and sale of distilled spirits in all their forms are hedged about by the internal revenue laws and regulations in such manner that any oversight of a user of alcohol for any purpose is but a part of the system of seeing that the laws designed for "collecting internal revenue" are not violated.

Thus, any attempt on the part of a manufacturer using alcohol in the arts, or in medicinal or other like compounds, to manufacture something in the nature of a

beverage without paying a special tax and taking out a license as a rectifier, would at once bring him within the provisions of § 3244, paragraph 3, of the Revised Statutes. Likewise any manufacturer who should sell any alcohol, either in the original shape in which he purchased it or after recovering it from any article in which he had used it, would thereby become a wholesale or retail liquor dealer, and be required by § 3244, paragraph four, to pay a special tax and obtain a license as such. The rectifier, or wholesale or retail liquor dealer, as the case might be, would thereby at once place himself under the supervision of officers of internal revenue, where every movement would be subject to surveillance by Government officers.

g. REMISSION AND REFUNDING OF TAXES.

Revised Statutes §§ 3220 and 3221 (the latter amended by act of March 1, 1879, § 6, 1 Supp. R. S. 235; 20 Stat. L. 341) relate to the remission and refunding of internal revenue taxes and penalties. All the work connected with the investigation of all such applications must be performed by the Commissioner's subordinates in his office, and by local officers in the field, all of whom are restricted, either by substantive law or by appropriation acts, to service in "collecting internal revenue." Yet the right to perform and pay for these services, incidental to the strict collection has never been disputed.

h. BOTTLING IN BOND.

A very recent act, that of March 3, 1897 (29 Stat. L. 626), to allow the bottling of distilled spirits in bond imposes upon local officers arduous duties, not to be classed, in the strict construction applied by the Secretary to § 61, as "collecting internal revenue." After distilled spirits have been entered for withdrawal upon payment

of tax or for export in bond without payment of tax, they may be purified, if desired, bottled in the distillery, cased, stamped and branded, in the presence of the United States revenue officer, and, if intended for export, are to be transported under such regulations as may be prescribed.

The report upon this bill (H. R. Rep. 1495, 54th Cong. 1st Sess.) says:

"The obvious purpose of the measure is to allow the bottling of spirits under such circumstances and supervision as will give assurance to all purchasers of the purity of the article purchased."

The report explains that American producers can under this law supply a demand for bottled goods under a stamp which has in the past been met by Canadian goods under Canadian law. This policy has nothing to do with collecting internal revenue, even in case of the domestic use of the bottled spirits; for to entitle the goods to the privileges of this act they must already have been entered for withdrawal upon payment of tax. Where bottled for export, no tax is ever paid.

In spite of this, the Secretary of the Treasury has not refused to carry out this law, because he has no appropriation available for it, although he has no other appropriation than that for "collecting internal revenue." It is noticeable also that this act was passed long after his decision that existing appropriations were not available for enforcing § 61 of the Act of 1894.

i. THE CUSTOMS APPROPRIATIONS.

A similar broad practice prevails in the construction of the customs appropriations. This service is supported in large part by a permanent annual appropriation, under Rev. Stat. § 3687. That appropriation is "for the

expenses of collecting the revenue from customs." It is used for all customs purposes, both for salaries and miscellaneous expenses. It is, indeed, the only head of appropriation for the entire customs service except certain permanent appropriations under Rev. Stat. § 3689 for debentures and other charges, drawbacks, bounties and allowances, distributive shares of fines, penalties and forfeitures, repayment of excess of deposits and refunding duties and proceeds of sales. Among the expenses paid from the appropriation for "collecting the revenue from customs" are those of the supervision of the bonded warehouse system (act of August 28, 1894, § 9, 2 Supp. R. S. 309; 28 Stat. L. 548) where goods subject to import and internal tax are manufactured without payment of duty and again exported. The expenses of §13 (2 Supp. R. S. 311; 28 Stat. L. 550) admitting machinery for repair without duty, are also paid out of this appropriation and those of § 21 (2 Supp. R. S. 312; 28 Stat. L. 551) permitting smelting in bonded warehouse.

The expenses also of repayment of drawback under § 22 (2 Supp. R. S. 313; 28 Stat. L. 551) upon imported duty-paid materials entering into articles manufactured in the United States and exported are defrayed from the same appropriation for the "expenses of collecting the revenue from customs." This section is the counterpart of § 61. It provides for the refund of customs duties upon the happening of certain events—the use of the duty-paid article in manufacturing and its exportation. Section 61 provides for the rebate of an internal revenue tax upon the use of the taxed article in the arts or manufactures.

In the one case, the Secretary of the Treasury has continually paid the expenses of settling the drawbacks out of the appropriation for the "expenses of collecting the revenue from customs." In the other, the same officer

insisted that the appropriations for "collecting internal revenue" were never available.

The construction of years followed in the Treasury Department is right and should be adopted in its application to the internal revenue appropriations as it has, in all cases, been actually followed by the Treasury Department.

The True Principle of Construction.

These many precedents drawn from both branches of the revenue service show that the uniform rule has been to avoid a strained construction of the general appropriations for collecting the revenue. It is essential to the revenue service that the appropriations should be general in character in order to leave room for wide executive discretion in the use of appropriate means for enforcing the entire revenue system. There is no warrant for invoking a judicial decision that this long-settled executive construction is erroneous.

The true principle of construction is that the appropriation for the salaries and expenses of collectors, agents, surveyors and other internal revenue officers is intended to be used for all the duties imposed by law or by regulations made in accordance with law upon these officers. They are directed by Congress to perform certain duties. General appropriations are made under a head appropriate to the chief purposes of the existence of their offices and these appropriations are available to pay their salaries and all the expenses incidentally arising in the performance of their numerous duties.

Section 61 gives power to the Secretary of the Treasury to prescribe regulations. Under these regulations duties would be required of collectors, and perhaps of agents, store-keepers, gaugers and other internal revenue officers. The appropriations to pay their salaries would

be available for service while performing these duties, equally as well as in receiving payment of taxes.

This law also directly imposes a duty upon the collector. Before the manufacturer is to receive the rebate he must exhibit and deliver up his stamps and present satisfactory evidence to the Collector of Internal Revenue of his use of the alcohol in the manner contemplated by the law. The collector being thus the officer specially charged with the administration of the act, all appropriations for the payment of collectors and deputy collectors of internal revenue are available to carry out the act and are the only appropriations legally necessary for that purpose, however convenient it might be in the judgment of the Commissioner of Internal Revenue to have other and special appropriations. The appropriation for his salary, even though under the head "collecting internal revenue," is necessarily available to pay him for all services prescribed by law.

That appropriations were in existence for the payment of these officers is not denied; and, this being so, it was just as incumbent upon them and their official superior, the Secretary of the Treasury, to use these appropriations for the performance of their duties under § 61 of the act of 1894, as under any other provision of the law prescribing their duties. This must be so unless the underlying implication of the position of the Secretary of the Treasury be correct,—that other laws, supposed to be of greater importance than § 61, were to be first enforced with the means at command, and then, if consistent with such convenient enforcement, § 61 could also be enforced. Hence, even if we concede the position taken by the Secretary,—that an appropriation for the enforcement of the section is necessary for its operation,—an appropriation existed for the payment of the only officers charged with any special duty under the section, and

it was, therefore, quite capable of being enforced. Whether these appropriations were or were not adequate is beside the point. It was the duty of the officers to execute all statutes to the best of their ability, and whether a law requiring the raising of revenue, or one requiring its "rebate or repayment," be of superior authority was a question which no executive officer of the Government was authorized to raise or consider in the discharge of his official duties.

The construction here contended for reads the internal revenue code as a single system and construes the law as heretofore uniformly held by the Treasury Department.

Section 61 Not a Novelty.

Much of the difficulty in regard to this question disappears when the internal revenue laws are thus reviewed. It is then seen that alcohol free of tax is not a new subject under the internal revenue laws, but that § 61 is a substitution of a wider general policy for a series of special exemptions which the law had already known. The difficulties both of law and of regulation which have been raised in regard to this act differ only in extent from those met and solved under other special laws. The real reason for the non-enforcement of this section is not to be found in the official correspondence relating to this subject but in the history of the times and the condition of the public treasury for months following the passage of the act of August 28, 1894.

IX. THE CLAIMANT'S COURSE FOLLOWED STATUTORY AUTHORITY.

The correspondence in regard to the issuance of regulations is in Finding VII (Rec. 7–9). This was entirely within the Department, and not for the public. The

public circular actually sent to inquirers "in consequence of" the letter of the Secretary of October 6, 1894, is as follows (Rec. 9):

"*Circular relative to applications for rebate under § 61 of the act of August 28, 1894.*

"WASHINGTON, D. C., *November 24, 1894.*

"In view of the fact that this department has been unable to formulate effective regulations for carrying out the provisions of § 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the 'arts, or in any medicinal or other like compounds,' collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used or the articles manufactured therefrom can be made, and that no application for such rebate can be allowed or entertained.

"JOS. S. MILLER, *Commissioner.*"

This is the only announcement made to inquirers of the position of the secretary and of his reasons.

It has already been suggested (*ante*, p. 27) that this circular may be regarded as a regulation intended to repeal or annul the law, which was declared by this court (*Campbell* v. *United States*, 107 U. S. 410) to be no bar to an action for recovery.

Prior to the issuance of this circular, manufacturers using alcohol under the arts were ready to be subjected to official inspection, if required, and if they met the official requirements, to obtain pay directly from the Treasury. After the secretary had thus declared himself free from all responsibility conferred upon him by the statute, the claimants correctly sought the very relief granted to all persons whose right to payment from the public treasury is denied by the executive. This is redress through the courts.

There are two systems provided for obtaining payment of claims against the United States, one by application to the Treasury Department (Rev. Stat. § 236; act of July 7, 1884, paragraph 2, 1 Supp. R. S. 470, 23 Stat. L. 254; act of July 31, 1894, § § 3–22, 2 Supp. R. S. 212–219, 28 Stat. L. 205–211); the other by securing a judgment of a court of competent jurisdiction under the act of March 3, 1887 (1 Supp. R. S. 559; 24 Stat. L. 505) or other statute. The latter system is, in general, contemplated only in case the application to the executive tribunal fails. Section 61 of the act of August 28, 1894, contemplated primarily the use of the former system and settlement of the claims at the Treasury. The Secretary, for reasons which were not legally sound but which were in his opinion sufficient, refused relief at the Treasury and necessarily referred all applicants for relief to the latter system.

The courts are specially organized for the ascertainment of disputed facts, and it has never been suggested in a judicial tribunal that the rights of the government are less carefully protected in the courts than in the executive departments, or that there is any greater danger of fraud in the former than in the latter tribunal.

This claimant, seeking the remedy left him, after the action of the Secretary of the Treasury, now presents himself to this court with a finding of the Court of Claims of every fact made essential to recovery by the law in the very manner left open to him by the Secretary in denying official inspection and executive determination.

Had the Secretary made regulations requiring official inspection no rights would have accrued to claimants unless the manufacture had been inspected; but this circular rendered them free from the need of inspection and permitted their cases to be proved by evidence

preserved by them and submitted under juridical safeguards.

X. A SUIT IN THE COURT OF CLAIMS THE ONLY APPROPRIATE REMEDY.

It was not claimed in the court below, and probably will not be here, that any other remedy than a suit in the Court of Claims was open to this claimant, such as an application for a writ of mandamus to compel the Secretary of the Treasury to carry out the duty of prescribing regulations devolved upon him by the section in question. A reference to several decisions of this court will make it plain that such an application would not have been granted. But, even if granted, it would have been wholly inadequate as a remedy for this appellant's grievances.

Mandamus Can Not Issue Where Discretion is to be Exercised.

In the case of *The Secretary* v. *McGarrahan*, 9 Wall. 298, the court thus stated the rule (p. 312):

"Though mandamus may sometimes lie against an executive officer to compel him to perform a mere ministerial act required of him by law, yet such an officer, to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official functions.

"Discussion of the principle, however, seems to be unnecessary, as all of the cases appear to affirm the same rule, that the writ can not issue where discretion and judgment are to be exercised by the officer, and only in cases where the act required to be done is merely ministerial, and where the relator is without any other adequate remedy."

United States v. *Knox*, 128 U. S. 230, was a suit in the Court of Claims by a United States Commissioner for fees of office. The principal objection made to the allowance of the claim was that the account had not been approved by the United States Circuit Court as required by law, and that it was incumbent on the claimant before bringing suit on the account to obtain such approval, and, if necessary, to resort to a writ of mandamus to compel the court to approve the account, as well as to compel the district attorney to present it for approval, that being the only mode provided by law for getting it before the Circuit Court for that purpose. The court said, however (p. 235):

"But as we feel well assured that the claimant, who has done everything in his power to secure action upon his account by the district attorney and the court, and who has a just claim against the government for services rendered under the act of Congress, has a remedy in the Court of Claims, we do not see why he should be compelled first to resort to a writ of mandamus against the Circuit Court. This remedy, always an unusual one and out of the ordinary course of proceeding, would be attended in the case before us with delay and embarrassment. It is not by any means so efficient nor so speedy as an action in the Court of Claims. If he should succeed after trouble, delay and expense, in procuring action by the local court, which might be either an approval or a disapproval of his claim, he would still have to go to the auditing department, in which the action of the court is only advisory, or he might sue in the Court of Claims as shown in the case of *Clyde* v. *United States*, 13 Wall. *ubi supra*."

In *Redfield* v. *Windom*, 137 U. S. 636, it was stated, as the principle (p. 643)

"distinctly defined and strictly adhered to in a great number and variety of cases before this court,"

"that the writ of mandamus may issue where the duty,

which the court is asked to enforce, is plainly ministerial, and the right of the party applying for it is clear and he is without any other adequate remedy; and it can not issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion."

And indeed, it was added:

"that, in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act." (P. 644.)

The principles thus adjudged by this court in a number of cases, of which the three cited have been selected as merely typical, would have been fatal to an application for mandamus had it been attempted, for the following reasons.

The duty of the Secretary of the Treasury of prescribing regulations, although imposed, as we have contended, by mandatory provision of law, was in no sense merely ministerial. It involved in very large measure the exercise of executive judgment as to the particular regulations to be adopted. The framing of regulations under the pressure of a writ of mandamus would not have been a method well adapted to securing proper or judicious regulations.

The court granting the mandamus would have had to judge whether the regulations were reasonable and adequate to the purpose intended, and in order to make the remedy of any efficacy would have had also to superintend their execution. All this would be manifestly impracticable, as against unwilling officers.

The case is not analogous to that of the issuance of the writ to a court commanding it to give judgment on a case or some particular motion or proceeding therein.

In such a case the party has no other legal remedy, and must obtain the judgment of the court one way or the other as a preliminary to his remedy before a higher tribunal by appeal or otherwise. *Ex parte Russell*, 13 Wall. 664; *Ex parte Roberts*, 15 Wall. 384; *Ex parte United States*, 16 Wall. 699; *Ex parte Flippin*, 94 U. S. 350; *Ex parte Railway Co.* 101 U. S. 720; *Ex parte Burtis*, 103 U. S. 238; *Ex parte Morgan*, 114 U. S. 174. But this rule has never been extended to the executive departments, against the officers of which the writ of mandamus can never be issued except to command the performance of purely ministerial acts.

In *Boynton* v. *Blaine*, 139 U. S. 306, the court said (p. 319):

"The writ of mandamus can not issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636, 644. When by special statute, or otherwise, a mere ministerial duty is imposed upon the executive officers of the government; that is, a service which they are bound to perform without further question, then if they refuse, the mandamus may be issued to compel them."

In the subsequent case of *In re Emblen*, 161 U. S. 52, the Assistant Attorney-General, arguing the case for the respondents in the writ, thus stated the distinction (Lawyers' Co.-Op. Ed. Book 40, p. 615):

"In the appellate jurisdiction over inferior courts, court officers, etc. there is no rule confining mandamus to ministerial acts; it is commonly used to compel the performance of duties involving discretion, exercise of discretion being *directed, but not controlled.*

But executive discretion can be *neither directed nor controlled.*"

And the judgment of the court was adverse to the granting of the writ on this very ground. This principle would specially apply in a case like this, where it is not a single act to be performed, but a series of acts, all involving judgment and discretion.

A Mandamus Necessarily Futile.

In the letter of the Commissioner of Internal Revenue of October 3, 1894, to the Secretary of the Treasury (Rec. 7), he says that it has been found impossible to prepare regulations without official supervision and asks whether there is any money appropriated for this purpose. The Secretary, on October 5 (Rec. 7) answers him that there is no appropriation. On the same date (Rec. 8) he writes the Secretary that, in view of the fact that there is no money for supervision, regulations should be delayed until Congress provides a fund, and the Secretary replies October 6 (Rec. 8), that he has considered the subject and that until further action by Congress it is not possible to make and enforce regulations.

If a mandamus had been applied for, the relator could only have prayed that the Secretary should make regulations, as required by the law. If granted, he thereupon would have prescribed a series of regulations and would in consistency have been bound (as he had said that effective regulations could not be made without supervision) to require supervision. This would have needed money and he had already decided that there was no available appropriation. A second mandamus proceeding would then have been requisite to command him to pay the expenses out of existing appropriations. But no court would issue a mandamus to control the Secretary in his use of the money in the Treasury appropriated by Congress for the expense of the Internal Revenue Bureau. While it is clear

that he had a right to use these appropriations for the purpose of enforcing such regulations, it is a matter peculiarly of executive control to what particular uses funds shall be put when claimed to be inadequate for all the purposes appropriated for. The principle is well settled that mandamus will not lie to compel the payment of money for a specific purpose from the Treasury. *Decatur* v. *Paulding*, 14 Pet. 497; *Reeside* v. *Walker*, 11 How. 272.

Consequently, after having secured regulations from the Secretary, the claimant would be in exactly the same situation as before. These regulations would have required supervision, the Secretary would have refused to carry them out in the absence of any appropriation by Congress, and the courts would not have interfered to oblige the Secretary to use money which he said was not available for this specific purpose.

No Mandamus Because Another Legal Remedy Existed.

The appellant had another specific legal remedy,—viz., the one here pursued, a suit in the Court of Claims. This is fatal to the right to a mandamus, which exists only where there is no other adequate legal remedy. This was one ground upon which this court acted in denying the writ in one of the very cases just cited, that of *Redfield* v. *Windom*, 132 U. S. 636. The relator in that case afterward adopted the very remedy pointed out to him by this court, sued in the Court of Claims, and recovered judgment (*Redfield* v. *United States*, 27 C. Cls. 393).

If, too, as we have throughout contended, the refusal of the Secretary of the Treasury to make proper regulations for the execution of this law, of itself constituted a breach of contract between the government and the manufacturers for the re-payment of the tax to such as should use alcohol, the responsibility of providing such regula-

tions was entirely upon the government. It is not incumbent upon a manufacturer desiring to avail himself of the benefits of the law to see that the government should carry out by its appropriate officers the duty imposed upon those officers more for the protection of the government than for the benefit of the manufacturer.

No Mandamus Because of the Interest of Other Parties.

In *Redfield* v. *Windom*, 137 U. S. 636, 644, it was said that the writ would be refused

> "in a case where the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto."

The granting of the writ at the instance of this one particular manufacturer would have compelled the Secretary to make general regulations applicable to the cases of all manufacturers who might desire the benefit of this law, many of whom were engaged in wholly different branches of industry, who were not, and could not become, parties to the suit, and whose rights would thus be determined without a hearing. In such a case, the remedy for individual wrong is an individual action under the statute.

XI. ALCOHOL PRODUCED BEFORE AUGUST 28, 1894.

By Finding III (Rec. 5), it appears that of the $7,244 tax paid on the alcohol in question, $2,344 was paid at the rate of ninety cents a gallon, the rate fixed by act of March 3, 1875 (1 Supp. R. S. 70, 18 Stat. L. 339), and therefore prior to August 28, 1894, the date of the act under which this claim arises. By § 48 of this act (2

Supp. R. S. 325, 28 Stat. L. 563), the tax was increased to $1.10 a gallon. The tax was paid at this rate upon the remainder of the alcohol used, amounting to $4,900. It was contended by counsel for the United States in the court below that a recovery, if at all, can only be for the latter amount.

No Discrimination in the Act.

The act itself makes no such discrimination. A rebate is to be paid upon the delivery of the stamps which "show that a tax has been paid thereon," and the rebate is to be "of the tax so paid."

The rebate is promised to the manufacturer who uses the alcohol upon his showing that a tax has been paid thereon. To support the defendants' construction it would be necessary for the claimant to be required by the statute to "show that a tax has been paid thereon since August 28, 1894," to entitle him to the rebate. This construction requires the importation into the statute of words not expressed and in no degree implied. It rests neither upon the terms of the statute nor upon sound reason.

The Intent of Congress.

The intent of Congress is clear. Alcohol has since 1862 been subjected to a heavy burden of taxation, based upon its use as a beverage. With the view of freeing alcohol in the arts from taxation, Congress provided that all persons so using it should be entitled to a rebate equal to the entire tax paid, upon exhibition and delivery of the stamps showing payment. No mention was made of the amount of tax paid—Congress evidently contemplating that whatever may have been the amount paid, the alcohol employed in the manner described in the act should be free of tax.

The Contract with the Manufacturer.

It was argued below that as no contract for repayment of the tax existed until August 28, 1894, no right to rebate accrued when the tax was paid before that date. This is an essential misapprehension of the contract. There is no contract between the distiller, who is the original tax-payer, and the Government. The contract is between the Government and the manufacturer who uses the alcohol. The promise is that, if he uses alcohol in the arts, he shall receive a rebate of the tax. The material date is that of the use of the alcohol in the arts and not of the payment of the tax. If used after August 28, 1894, no matter when the tax was paid, the Government has agreed with the manufacturer to refund the tax.

Is the Act Retrospective?

The construction now contended for is in no just sense retrospective. A recent able work, "Black on Interpretation of Laws," p. 247, thus defines a retrospective law:

"A retrospective law is one which looks backward or contemplates the past; one which is made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them characteristics, or ascribes to them effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence."

Authorities are cited in support of this definition, and it is said:

"A statute can not properly be called retrospective merely because a part of the requisites for its operation may be drawn from a time antecedent to its passage."

Even if the construction herein contended for be retrospective it would not follow that it is for that reason

alone to be rejected. The Constitution contains no inhibition upon the passage of retrospective laws by Congress where they do not make an act criminal which was not so before the passage of the act, or deprive any person of his property without due process of law. The courts often give a retrospective construction to statutes that disturb no vested rights. *Hawkins* v. *United States*, 19 C. Cls. 611; *McNamara* v. *United States*, 28 C. Cls. 416.

Precedent.

In an opinion of the Attorney-General of April 19, 1895 (21 Opinions, 159), it is held that the provision of the copyright act of March 3, 1891, that during the existence of the copyright the importation into the United States of the copyrighted book shall be prohibited, is not confined in its application to books copyrighted since the passage of the act, but extends to all books lawfully copyrighted, whether before or since the passage of the statute. The following reasoning (p. 161) is fully applicable to the question now before the court:

"Does this apply only to such books as shall have been copyrighted since March 3, 1891? I think not. It secures to the owner of the copyright of every book which shall have been copyrighted in accordance with the requirements of this statute, whether before or after its passage, protection against the sale in this country of foreign publications of his book by prohibiting the importation of such foreign publications. The act is prospective only as to this new security which it affords to the owner of the copyright, and is not prospective as to the books to which that security applies.

"He can not claim indemnity for losses sustained by reason of such importation and sale prior to the passage of the act; but while his copyright continues, whether it was acquired before or since March 3, 1891, the benefit of the act extends to him.

"Neither the letter, the spirit, nor the reason of the act confines the application of the protection it affords to those books that have been copyrighted since its passage.

"Tariff laws are prospective. But an amended statute which places on the free list certain articles theretofore subject to duty is not limited in its application to those articles of that class which have been produced or manufactured since the passage of the amendatory act."

Consequences Illustrated.

To put the question in a concrete form will show the illogical consequences of a different construction of the act. Let us suppose that two manufacturers in the same line of business (say the manufacture of hats) on the day after the passage of the act purchased the same quantity of alcohol and used it in precisely the same manner. One purchased alcohol upon which the tax had been paid prior to August 28, 1894, of ninety cents a gallon. The other purchased alcohol which may also have been fully produced prior to August 28, 1894, though not taken out of bond till the day after, upon which the tax of $1.10, as provided by the new law, had been paid. The new rate of tax took effect upon all alcohol upon which the tax had not already been fully paid, though already produced and in bond. Of these two manufacturers, though both might have paid precisely the same price for the article, one, according to the theory suggested, would be entitled to a rebate of $1.10 a gallon on the alcohol used by him, while the other, upon whose goods a tax of only 90 cents had been paid, would be entitled to nothing at all. According to this theory, the government would save not merely the difference of twenty cents a gallon in the tax by a manufacturer using alcohol upon which the tax had been paid before August 28, 1894, but the entire amount of the rebate. Surely a theory leading

to such an absurd consequence can not be correct, especially when it would involve a strained construction of the very terms of the act.

On the contrary, every consideration of sound reason is entirely in favor of the opposite construction. If a manufacturer, on August 28, 1894, had on hand alcohol upon which a tax had already been paid, it was to the advantage of the Government that he should use this and secure a rebate upon it at the rate of ninety cents a gallon rather than purchase alcohol upon which the tax had been paid after August 28, 1894, and secure a refund of one dollar and ten cents a gallon. The position assumed by counsel for the United States would have obliged him to sell all such alcohol in his possession and buy a new stock. Then he could obtain from the Treasury twenty cents a gallon more than if he had used his original stock.

In this case it is readily supposable (though the record does not expressly show it) that the claimant did not buy this alcohol until after August 28, 1894. To declare his entire rebate forfeited because he did not purchase alcohol upon which the United States would have been obliged to pay twenty cents a gallon more rebate would violate the principle laid down by this court in *United States* v. *Kirby*, 7 Wall. 482, 486, 487:

"General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

XII. CONCLUSION.

The importance of the case, the number of subjects discussed in the opinion below and the earnestness of the defense interposed by the Government have justified a

more elaborate argument than might otherwise have seemed necessary.

The single question before the court is whether freedom from tax granted by Congress can be defeated by executive inaction.

The courts have uniformly decided that this can not be done. The Court of Claims finds in the language of this statute a difference from that used in all others judicially interpreted sufficient to warrant a departure from this principle. The appellant insists that there is nothing in the language differing in any essential from that used in statutes already interpreted; that the purpose of Congress is clearly expressed and should not be defeated by straining the verbal construction to disregard the legislative intent, and that the case must be decided in accordance with the previous decisions of this court, protecting the citizen freed from tax by Congress from taxation by the uncontrolled exercise of executive will.

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APPENDIX.

Letter of David A. Wells, formerly Special Commissioner of the Revenue, in relation to the effects upon the use of alcohol in the arts and manufactures of the imposition of a tax upon distilled spirits.

NORWICH, CONN., *October 11, 1887.*

DEAR SIR: I am in receipt of your note of October 8, requesting me to communicate to you any information I may have in respect to the percentage of distilled spirits used in the arts at the present time in the United States. I regret that I am not able to communicate any information of value relative to the present condition of affairs, although formerly when special commissioner of the revenues, I gave much attention to the subject.

Prior to the imposition of any taxes on distilled spirits, or before the war, I am of the opinion that at least 33 per cent of the whole product of the country, which in 1860 was probably about 90,000,000 proof gallons, was consumed in the arts and industries. In support of this conclusion I would ask your attention to the following extract from a report of the result of my investigations (as United States special commissioner of revenue on this subject), which I have heretofore published, showing somewhat in detail the extent and character of the consumption of distilled spirits in the United States for industrial, medicinal, and art purposes prior to 1860, and the effects of subsequent high Federal taxation in curtailing or absolutely preventing such consumption.

For a period of nearly a half century previous to 1860 the manufacture of spirits in the United States had been free from all specific taxation or supervision by either the National or State Governments, and being produced mainly from Indian corn, at places adjacent to the localities where this cereal was cultivated, and to

a large extent also from corn that was damaged and so otherwise unmarketable, was afforded at a very low price, the average market price in New York for the four years next preceding 1862 having been about 23 cents per proof gallon, with a minimum price during the same time of 14 cents per gallon. In Cincinnati the market price of whiskey for August, 1861, was commercially reported as "closing dull" at 13 cents per gallon. The price of alcohol in New York during the period above noted ranged from 40 to 60 cents per gallon. Under such circumstances the consumption of distilled spirits in the United States previous to the war for a great variety of purposes, had become enormous, affording a practical illustration of the curious varying relations between prices and consumption, and also of what may be considered in the light of an axiom in political economy, namely, that practically there is almost no limit to the consumption of any useful commodity, provided that through a reduction of cost or price it is brought within the purchasing power of those who desire to consume.

Thus for the year ending June, 1860, the product of distilled spirits in the United States as returned by the census, was 89,308,581 gallons (proof spirits), or, including alcohol, 90,412,581 gallons, and this aggregate, subsequent investigations proved, was considerably less, rather than in excess of the actual production. The maximum quantity of domestic distilled spirits exported in any one year previous to the war was never in excess of 3,000,000 gallons, so that the annual consumption of domestic spirits in the United States in 1860, for all purposes, was at the rate of nearly 3 gallons for every man, woman, and child of the population.

It would be an error, however, to assume that all of this immense production of spirits was used for intoxicating purposes or in the way of stimulants, inasmuch as the extreme cheapness of proof spirits and of alcohol in the United States at the period under consideration occasioned their employment in large quantities for various purposes which were absolutely or almost unknown in Europe, where the price of these same products,

through the fiscal necessities of the various governments, has always been made so artificially high as to greatly limit their industrial application. Thus one of these employments, peculiar to the United States at this time, was the manufacture of a cheap illuminating agent known as "burning fluid," composed of one part of rectified spirits of turpentine mixed with from four to five parts of alcohol, each gallon of alcohol thus used requiring 1.88 gallons of proof spirits for its manufacture. The use of this preparation in the United States in 1860 in places where coal gas was not available was all but universal, and necessitated a production and consumption of at least 25,000,000 gallons of proof spirits per annum, which in turn would have required the production and use of from 10,000,000 to 12,000,000 bushels of corn. And so extensive was the scale on which its manufacture was conducted that in Cincinnati alone the amount of alcohol required every twenty-four hours for this industry was equivalent to the distillate of 12,000 bushels of corn. Here, then, had been gradually created a new, peculiar, and large market for one of the staple products of American agriculture and also for the peculiar product—turpentine—of mainly one agricultural State, North Carolina.

The excessive cheapness of alcohol also led to its most extensive use for fuel in manufacturing and in domestic culinary operations, for bathing and cleaning, for the manufacture of varnishes, vinegar, imitation wines, flavoring extracts, perfumery, patent medicines, white lead, percussion caps, hats, photographs, tobacco, and a great variety of other purposes. It is also to be noted as a curious part of this history that nearly all preparations washes and dyes for the hair, which at that time in other countries—as now almost universally—were prepared almost exclusively on a basis of fats or oils or some non-spirituous liquids, were in the United States then composed almost wholly on a basis of alcohol, the comparative difference in the price of this article in the United States and Europe giving an entirely different composition to a product of large consumption intended to effect a common object. The transcript of the sales of a single distillery

and rectifying establishment in New York City, put in as evidence before the United States Revenue Commission in 1865, showed sales in a single year of 19,040 gallons of alcohol in one case and 12,657 in another to two manufacturers of different popular hair washes and tonics. From the same firm a manufacturer of an "extract of sarsaparilla" bought in one year 81,300 gallons, and another manufacturer, who made a "pain killer" 41,195 gallons. A single firm of patent medicine proprietors in Massachusetts testified their consumption of distilled spirits to have averaged 100,000 gallons per annum, while another in western New York, engaged simply in the manufacture of a horse medicine, reported a consumption, prior to the imposition of internal revenue taxation, of upwards of 50,000 gallons of proof spirits annually. Individual hair dressers in the large cities also testified that the use of 400 gallons of alcohol (equal to 750 gallons of proof spirits) yearly in their local business was not an unusual circumstance.

For the manufacture of imitation wines the demand for distilled spirits in the United States prior to 1864 was also very large, four firms in the city of New York reporting a consumption of 225,000 gallons of pure spirits for this purpose during the year 1863. Large quantities of neutral or pure spirits were also used at the time in the United States for the "fortifying" of cider, to prevent or retard acidification, especially in the case of cider intended for export to tropical countries, to the Southern States, or to the Pacific. One distiller in western New York reported a regular sale, during the year 1862, of 8,000 gallons per month for this purpose exclusively.

The first tax imposed by Congress on distilled spirits of domestic production was 20 cents per proof gallon, and went into effect on the 1st of July, 1862. This tax continued in force until March 7, 1864, when the rate was advanced to 60 cents per gallon. On the 1st of July, less than four months subsequently, the rate was again raised to $1.50 per gallon, and on the 1st of January, 1865, six months later, it was further and finally advanced to $2 per gallon. In addition to these specific taxes

heavy additional taxes on the mixing, compounding, and wholesale and retail dealing in spirits were also imposed in the way of licenses.

The immediate effect of this imposition and rapid increase of internal taxes upon distilled spirits was a series of industrial and commercial phenomena, more remarkable than anything of the kind before recorded in economic history; and yet so completely was the attention of the American people engrossed at this time in other and greater events—events affecting their very existence as a nation—that the results referred to did not so much as create a ripple in public opinion, and were barely adverted to, if noticed at all, in the columns of the public press. In short, the influence of these taxes was to entirely and rapidly revolutionize great branches of domestic industry, and in some instances to utterly destroy them. Thus, for example, the manufacture of burning fluid entirely ceased, inasmuch as the rise in the price of alcohol from 40 cents to $4 and upwards per gallon, together with the cessation of the supply of turpentine from North Carolina—then a State in rebellion—rapidly converted it from the cheapest to the dearest of all illuminating agents. Here also, very curiously, the public did not experience any great inconvenience by reason of this change; for by one of those happy and unexpected occurrences, almost in the nature of accidents, which have so often characterized the history of the United States, and which some are pleased to regard as "special providences," it so happened that the discovery of vast and natural supplies of petroleum in Pennsylvania, and the practical application of its distillates for illuminating purposes, was almost coincident in point of time with the compulsory disuse of burning fluid; while the fact that the new material possessed great advantages in point of cheapness and effect over the old caused the change in popular use to be effected voluntarily and with great rapidity. As a further illustration of the compensations which invariably attend the losses immediately contingent upon industrial progress, and through the disuse of old products, methods, and machinery, it may be stated that, although the manufacture of burn-

ing fluid ceased, the business of collecting, preparing, and exporting petroleum rapidly became one of the most important in the country; while the demand at home and abroad for the lamps and their appurtenances devised and adapted in the United States for the use of the distillates of petroleum was alone sufficient to employ the entire manufacturing capacity of all the glassworks of the country for a term equivalent to two entire years.

Druggists and pharmaceutists in the United States estimated the reduction in the use of alcohol in their general business, consequent upon its increased cost from taxation, at from one-third to one-half. The popular hair preparations into which alcohol entered largely as a constituent vanished from the market; and the manufacturers of patent medicines and cosmetics generally abandoned their old preparations and adopted new ones. The manufacturer of horse medicines, who used 50,000 gallons of spirits in 1863, woefully testified in 1865 that his business was destroyed. Varnish makers, who, when alcohol could be purchased at from 50 to 60 cents per gallon, used it in large quantities, were of necessity compelled to entirely or in a great degree abandon its use when the price rose to $4 per gallon and upward; and yet special investigation showed that the quantity of varnish manufactured was not correspondingly reduced, inasmuch as the manufacturers at once substituted other and cheaper solvents for their gums, especially the napthas or light distillates of petroleum which were then opportunely seeking uses and a market. Within a comparatively few years, also, the continued high price of alcohol has led the manufacturers of quinine to substitute the distillates of petroleum as a solvent for the alkaloids in the cinchona barks, and with such success that it is doubtful whether the old processes would be again adopted, even if alcohol could again be afforded at its former prices. The manufacturers of hats, who had before used a composition of gum-shellac dissolved in alcohol almost exclusively for stiffening the hat "bodies" or "foundations," and were thus large consumers of alcohol, were compelled to abandon its use, and for a time were subjected to no little inconvenience. But even here

substitutes were soon found, and in addition to the use of cloth as a material for hats in the place of felt and silk, plush was largely introduced and became popular. The manufacture of vinegar from whiskey, by reason of the great advance in the price of distilled spirits, was also in a large degree broken up, and this in turn had the effect to destroy a large export business of this article, as well as to increase the market price of pickles to the extent of from one-third to one-half, and also to seriously affect the manufacture and cost of white lead, and occasion extensive importations of this article from other countries.

The business of fortifying cider for movement or export to the Pacific coast and to the tropics before referred to, as well as the manufacture of imitation wines and of cheap perfumery, was likewise very seriously interfered with or destroyed, as was also the business of manufacturing the fluid extracts of the medicinal principles of plants; and it was represented to the revenue commission by members of the American Pharmaceutical Association that there was a marked tendency throughout the country on the part of physicians and others to abandon the use of alcoholic extracts and fall back upon the old custom of employing crude drugs, decoctions and sirups as substitutes; and further that there was an attempt to keep down the price to the consumer of many officinal preparations which absolutely required the use of alcohol by putting them up at less than their proper officinal strength, thus inflicting a sanitary injury upon the whole community. Finally, in all branches of the industrial arts, where the continued use of distilled spirits was indispensable and no cheaper substitute could be found, the utmost economy in its use was everywhere practiced.

Another curious incident connected with this history was that the curators of the leading museums of the country—anatomical or natural history—attached to institutions of learning, memorialized Congress to the effect that, owing to the high price of alcohol they could not afford to make good the waste of this substance (by evaporation and leakage) as employed by them for scientific purposes; and that in consequence many important col-

lections were becoming greatly impaired in value, and the progress of scientific discovery and research greatly impeded. And Congress, recognizing the desirability of giving relief in respect to this matter, empowered the Secretary of the Treasury to grant permits to incorporated American institutions of learning to withdraw spirits from bond in specified quantities for scientific purposes without payment thereon of the internal revenue taxes.

My opinion now is that not more than 10 per cent as a maximum, of the present product of distilled spirits in the United States is used for industrial, artistic, or medicinal purposes.

If the present tax of 90 cents per proof gallon could be reduced to 50 cents, the rate established from 1868 to 1872, I have no doubt that the use of alcohol for industrial and medicinal purposes would be very largely increased, cheapening many manufactured products, enlarging the market for the same both at home and abroad, and without occasioning any material reduction of the national revenues.

I am, yours, most respectfully,

DAVID A. WELLS.

Mr. WILLIAM F. SWITZLER.